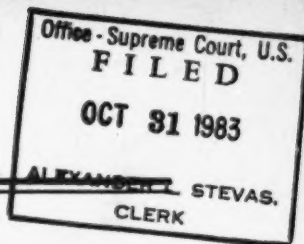


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No. _____



IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY III, Attorney General
of the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of
itself and its qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPELLANTS' JURISDICTIONAL STATEMENT

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota
KENT G. HARBISON
Counsel of Record
Chief Deputy
Attorney General
102 State Capitol Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2351
Counsel for Appellants

October 31, 1983

Of Counsel:

RICHARD L. VARCO, JR.
Special Assistant
Attorney General
State of Minnesota

QUESTIONS PRESENTED

1. Does the First Amendment to the United States Constitution allow an organization that markets leadership training through the sale of memberships to discriminate against women in violation of a state human rights law merely because the organization also takes stands on some public issues when the sex of the members has no demonstrated effect on the content of those positions?

2. In rejecting the United States Jaycees' suggestion that it is a private membership organization, did the Minnesota Supreme Court create a distinction between public accommodations and private membership organizations which is vague and hence unconstitutional?

PARTIES TO THE PROCEEDING

The caption of this case contains the name of one of the parties, George A. Beck, to the proceeding before the United States Court of Appeals for the Eighth Circuit whose judgment in the above stated questions appellants seek to have reviewed. Irene Gomez-Bethke and Hubert H. Humphrey, III have replaced Marilyn E. McClure and Warren Spannaus, respectively, as Commissioner of the Minnesota Department of Human Rights and Attorney General.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	i
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Constitutional Provisions, Statutes	4
Statement of the Case	5
Substantiality of Question	10
A. State Regulation Of The Jaycees' Membership Policy Is Not A Burden On That Organization's First Amendment Freedom To Speak, Assemble, Or Petition For Redress Of Grievances	11
B. The State's Interest In Prohibiting Sex Discrimi- nation In Public Accommodations Is Compelling And Thus Justifies Its Interference With Jaycees' Membership Requirements	14
C. The Minnesota Supreme Court's Opinion In Mc- Clure v. United States Jaycees Does Not Create An Unconstitutionally Vague Distinction Between Public Accommodations And Private Membership Organizations	18
Conclusion	20

TABLE OF AUTHORITIES

	Page
<i>United States Constitution:</i>	
First Amendment	<i>passim</i>
<i>Federal Statutes:</i>	
28 U.S.C. § 1254(2)	3
28 U.S.C. § 1343	2
42 U.S.C. § 1981	19
42 U.S.C. § 1983	2
42 U.S.C. § 2000a(e)	19
42 U.S.C. § 2000e(b) (2)	19
<i>Minnesota Statutes:</i>	
Minn. Laws 1973, ch. 729 § 3	20
Minn. Stat. § 363.01, subd. 18 (1980)	8, 18
Minn. Stat. § 363.01, subd. 18 (1982)	3, 4
Minn. Stat. § 363.03, subd. 3 (1982)	4
Minn. Stat. § 363.12, subd. 1 (1982)	10
<i>Federal Cases:</i>	
Baker v. Nelson,	
291 Minn. 310, 191 N.W.2d 185 (1971),	
appeal dismissed, 409 U.S. 810 (1972)	13
Bates v. City of Little Rock,	
361 U.S. 516 (1960)	14
Bob Jones University v. United States,	
103 S.Ct. 2017 (1983)	16
Buckley v. Valeo,	
424 U.S. 1 (1976)	13, 14
Elrod v. Burns,	
427 U.S. 347 (1976)	14

	Page
Fesel v. Masonic Home of Delaware, Inc., 428 F. Supp. 573 (D. Del. 1977)	19
Garcia v. Texas State Board of Medical Examiners, 384 F. Supp. 434 (W.D. Tex. 1974), <i>aff'd mem.</i> , 421 U.S. 995 (1975)	13
Grayned v. City of Rockford, 408 U.S. 104 (1972)	19
Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)	16
Oyler v. Boles, 368 U.S. 448 (1962)	17
Quijano v. University Federal Credit Union, 617 F.2d 129 (5th Cir. 1980)	19
Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945)	13
Runyon v. McCrary, 427 U.S. 160 (1976)	13
United States Jaycees v. McClure, 534 F. Supp. 766 (D. Minn. 1982)	17
United States Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983)	18
United States v. Trustees of Fraternal Order of Eagles, 472 F. Supp. 1174 (E.D. Wisc. 1979)	19
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	13
Wright v. Salisbury Club, 632 F.2d 309 (4th Cir. 1980)	19

	Page
<i>Minnesota Cases:</i>	
United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981)	18, 19
<i>Other States' Cases:</i>	
Richardet v. Alaska Jaycees, 666 P.2d 1008 (Alaska 1983)	10
Sail'r Inn, Inc. v. Kirby, 5 Cal. 3rd 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971)	16
United States Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. App. 1981)	10
<i>Books:</i>	
C. Jencks, Inequality—A Reassessment of the Effect of Family and Schooling in America	16
L. Tribe, American Constitutional Law	18
<i>Misc:</i>	
Bureau of Labor Stat., U.S. Dep't of Labor, Bull. No. 1886, Job Seeking Methods Used by American Workers (1972)	16

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**APPELLANTS' JURISDICTIONAL
STATEMENT**

OPINIONS BELOW

The opinion of the United States District Court for the District of Minnesota is reported at 534 F. Supp. 766 (D. Minn. 1982); that of the United States Court of Appeals for the Eighth Circuit at 709 F.2d 1560 (8th Cir. 1983). The opinion of the Minnesota Supreme Court is reported at 305 N.W.2d 764 (Minn. 1981). The decision of Administrative Hearing Examiner George A. Beck is unreported and is reproduced in the Appendix at 93 through 130.¹

JURISDICTION

This appeal is taken from a judgment entered June 7, 1983 by the United States Court of Appeals for the Eighth Circuit. A timely petition for rehearing of the panel's 2-1 decision was denied by an equally divided (4-4) court in an order entered August 1, 1983. The court reversed the judgment of the district court and ordered it to enter injunctive relief with respect to appellants (defendants-below) on the basis that they were acting pursuant to a statute which unconstitutionally infringed plaintiff's first amendment associational rights and was unconstitutionally vague as interpreted. The action in the lower court was brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. This federal court action was commenced by the United States Jaycees after it was enjoined from sex discrimination in the sale of its memberships by Hearing Examiner George Beck in an administrative contested case brought pursuant to the Minnesota Human Rights Act, Minn. Stat. ch. 363 (1982). Prior to issuing its decision in

¹ Citations to the foregoing opinions will be to Appendix (herein "A.") and the appropriate page.

this matter, the district court certified to the Minnesota Supreme Court the question whether as a matter of state law the United States Jaycees is a place of public accommodation within the meaning of Minn. Stat. § 363.01, subd. 18 (1982). That question was answered in the affirmative.

A notice of appeal to this Court was filed in the United States Court of Appeals for the Eighth Circuit on October 11, 1988.

This appeal is being docketed with this Court within ninety days from the entry of the court's order denying a petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISIONS, STATUTES

This appeal involves the following federal and state laws: First Amendment, United States Constitution, as it relates to freedom of speech and association:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

Minn. Stat. § 363.03, subd. 3 (1982):

It is an unfair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.

Minn. Stat. § 363.01, subd. 18 (1982):

'Place of public accommodation' means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

STATEMENT OF THE CASE

The United States Jaycees is a nationwide civic organization. HRT II at 9, 21.² In exchange for membership fees, it provides its members with materials and opportunities for the development of leadership, communication, and management skills. Comp. Exhs. 6 at 3-5 and 80 at 1. Through its by-laws, the Jaycees regulates its component groups, state and local (usually city) chapters. P. Exh. 2. The primary aim of the Jaycees is to provide leadership training to its membership. *Id.*, Comp. Exh. 80. The organization has therefore developed numerous programs for its chapters which are designed to offer members an opportunity to develop and practice organization, communication and leadership skills and to thereby improve not only the individual but also his community and Jaycees chapter. Comp. Exhs. 22, 40, 42. Thus an individual who participates in or directs such a program could benefit by enhancing or developing organizational or management skills while simultaneously making a contribution to the improvement of life in his community and elevating the status of the Jaycees chapter. To assist in the successful completion of such a project, an individual Jaycee has at his disposal a variety of techniques developed by the Jaycees, the support of other Jaycees, and the organization's prestige earned by past Jaycees community projects. Comp. Exhs. 2, 6; HRT I at 137, 140, 178, 182. Finally, in addition

² Citations to the record take several forms. The transcript and exhibits from the district court are referred to as T. and P. Exh. together with the appropriate page or number. The transcript and exhibits from the administrative hearing were introduced at and received by the district court. They are referred to as HRT I or HRT II (transcript) and Complainant (Comp.) or Respondent (Res.) Exh.

to the technical advice described above, the U.S. Jaycees provides its chapters and its members the important motivational device of an extensive award program which recognizes the achievements of Jaycees chapters and members. P. Exh. 1; Comp. Exhs. 1, 76.

Jaycees involvement in civic affairs has led it to articulate positions regarding issues of local, state and national concern. This has taken various forms. The Jaycees' Executive Board of Directors (its national officers and presidents of state chapters) adopts policy statements regarding issues of concern to the membership. Thus, for example, in 1980 the Jaycees urged Congress to act to achieve the voluntary use of prayer in schools. P. Exh. 1. Members of state and local chapters have participated in public affairs. In 1971, Minnesota Jaycees supported efforts to reduce the size of the Minnesota legislature. P. Exh. 19. Moreover, *Future*, a magazine published by the Jaycees and distributed to its membership, contains articles and editorial positions on issues of interest to the Jaycees.³ P. Exh. 4. Finally, certain of the programs developed and disseminated by the Jaycees for its local chapters have a political cant. In 1981, the Jaycees made available a program to its local chapters which provided a mechanism whereby interested Jaycees could lobby for passage of the then-current economic program of the Reagan administration. P. Exh. 6.

Although women are eligible for membership in the Jaycees, they are relegated to second-class status, i.e., Associate Member. They cannot be an Individual Member. As such, women are prohibited from voting or from holding any elec-

³ Pursuant to the Jaycees' by-laws, these opinions do not necessarily represent the official attitude or policy of the organization. P. Exh. 1.

tive office at the local, state, or national level. In addition, they are excluded from virtually all participation in as well as recognition from the Jaycees' awards program. Comp. Exhs. 1, 6, and 76; HRT I at 28, 49, 159, 161.

Despite these restrictions, Minnesota women have sought to obtain the benefits, both personal and professional, which are available from participation in the Jaycees. Since 1974 and 1975 respectively, the local chapters of the Minneapolis and St. Paul Jaycees have admitted and treated men and women as Individual Members. HRT I at 120, 157, 168. For example, membership in the Minneapolis chapter grew from 45 female members in 1975 to approximately 180 in 1979. HRT I at 123. In 1981, there were 311 female Individual Members in Minnesota. P. Exh. 21. Moreover, women have held various elective offices in those chapters. HRT I at 124, 169. As a result of this conduct, the Jaycees initiated proceedings to revoke the charters of those two chapters. Comp. Exh. 77; HRT I at 123, 168.

Faced with this threatened action, in 1978 members of the Minneapolis and St. Paul chapters filed charges of discrimination with the Minnesota Department of Human Rights alleging that this action constituted a violation of the public accommodations provision of the Minnesota Human Rights Act. On January 25, 1979, the Commissioner of the Department of Human Rights found probable cause to believe that these allegations were true, issued a complaint, and set the matter on for hearing before a state hearing examiner, George Beck. A. 94.

On February 27, 1979, the Jaycees filed suit in the United States District Court for the District of Minnesota seeking declaratory and injunctive relief against the enforcement of the Human Rights Act. The Jaycees claimed that the at-

tempted enforcement of the Human Rights Act against it deprived the Jaycees of the freedom to associate or not associate guaranteed by the first and fourteenth amendments to the United States Constitution. Moreover, it claimed that the definition of a place of public accommodation was unconstitutionally vague. That action was dismissed without prejudice. A. 95-96.

The hearing before Examiner Beck followed. The administrative proceedings concluded with the issuance on October 9, 1979 of Hearing Examiner Beck's decision. He held that the Jaycees was a place of public accommodation within the meaning of the Human Rights Act and that its sexually discriminatory membership policies violated the Act. He therefore enjoined the Jaycees from revoking the charter of any local chapter in Minnesota and from discriminating against any member or applicant for membership within the State of Minnesota on the basis of sex. A. 107-109.

On October 31, 1979, the Jaycees returned to federal court, filing the action from which this appeal comes. A. 53. Thereafter, in response to a request from the district court, the Minnesota Supreme Court answered in the affirmative the certified question as to whether the United States Jaycees was a "place of public accommodation" within the meaning of Minn. Stat. § 363.01, subd. 18 (1980). A. 69 *et seq.* After receiving this answer, the Jaycees coupled its claim of associational freedom with the additional assertion that the public accommodation provision of the Human Rights Act was vague as construed. The district court rejected appellee's vagueness arguments. A. 65-66. In addition, the court held that the state's interest in securing freedom for its citizens from sex discrimination outweighed whatever associational

interest, the existence and extent of which it left undecided, was accorded the Jaycees by the first amendment. A. 60-64.

The court of appeals disagreed. It held that when the Jaycees takes positions on political and civic issues, it is engaging in a traditional first amendment activity. A. 19-23. Thus, because the state's interest in eliminating sex discrimination is not sufficiently compelling, the Jaycees is entitled to the freedom to associate in a sexually discriminatory manner. The court reached this conclusion in the absence of any evidence that sex is a factor in any Jaycees' position on a political or civic question. Finally the court concluded that the Minnesota Supreme Court had construed the Human Rights Act in an unconstitutionally vague manner. A. 41.

SUBSTANTIALITY OF QUESTION

The state has attempted through legislation to eliminate sex discrimination in public accommodations, declaring that it "threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy." Minn. Stat. § 363.12, subd. 1 (1982).⁴ This "public policy" confronts the Jaycees' desire to limit certain membership privileges in that organization on the basis of sex. *Id.* At issue in this case are questions made novel and constitutionally significant by the basis upon which the lower court favored the Jaycees' interest over the state's. It did so by extending to that organization a freedom to associate without any showing that such freedom is necessary to protect an enumerated first amendment right.

Though a membership organization, the Jaycees is a statutory public accommodation. Though the leadership training which it markets can be obtained without engaging in ideological activity, some Jaycees' projects and pronouncements involve civic and political issues. The freedom to take positions on such issues has, in other settings, been guaranteed by the speech, press, petition, and assembly clauses of the first amendment.

The lower court held that state regulation interfered with the associational freedom accorded these interests without sufficient justification. In so doing it has either cast freedom

⁴ Thirty-three states and the District of Columbia have statutes prohibiting discrimination on the basis of sex in public accommodations. Four others which do not prohibit public accommodations discrimination on this basis do so on other grounds, e.g., race. *Cf. Richardt v. Alaska Jaycees*, 666 P.2d 1008 (Alaska 1983); *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. App. 1981) (Jaycees not place of "public accommodation").

of association as an independent constitutional right or clearly erred in attributing to the state regulation interference with traditional first amendment guarantees. Second, the court's unwillingness to term the state's regulatory interest compelling is based upon a balancing test in which the state's interest is acknowledged but depreciated in a factually and legally erroneous manner. Finally, the court has examined an offhand comment by the Minnesota Supreme Court while answering the certified question and concluded, contrary to the record and the intent of the supreme court, that it established a distinction between public and private organizations so fine as to be nonexistent and hence unconstitutionally vague. In so holding, the lower court created a standard for vagueness which contravenes that established in the decisions of this Court. The manner in which the court below has thwarted one aspect of Minnesota's efforts to eliminate sex-based discrimination in public accommodations merits the consideration of this Court.⁵

A. State Regulation Of The Jaycees' Membership Policy Is Not A Burden On That Organization's First Amendment Right To Speak, Assemble, Or Petition For Redress Of Grievances.

After an inconclusive discussion as to whether freedom of association is possessed of an independent first amendment status or is but a derivative right which protects enumerated

⁵ The opinion of the lower court is based upon a factual characterization of the Jaycees which differs from those of the district court and the Minnesota Supreme Court. Moreover, the decision rests upon theories of constitutional law not supported by the decisions of this Court. These errors can be corrected by summary reversal of the judgment of the lower court.

rights of speech, press, petition and assembly, the lower court concluded that a "good deal" of Jaycee activity is "association in pursuance of the specific ends of speech, writing, belief, and assembly for redress of grievances." A. 22-23. It then concluded that the state's regulation interfered with that freedom of association by diluting the all-male aspects of the organization, i.e., voting, holding elective office, and eligibility for receipt of awards, through female participation. See A. 24-25.

That portion of the opinion is grounded upon the lower court's observation that:

It is natural to expect that an association containing both men and women will not be so single-minded about advancing men's interests as an association of men only.

A. 24.

Nowhere in the record, however, does there appear a Jaycees' position on a social, civic, or political issue in which one's outlook would be dictated by one's sex. Moreover, the record is empty of any Jaycees' project in which a member's participation would be inexorably linked to his or her sex.⁷ Finally, there is no factual basis for the court's suggestion that "it is not hard to imagine" that women would seek to

⁶ Additional quantifying terms were "substantial" and "a not insubstantial part." A. 2, 22. Although the record contains evidence of many such activities, it does not support the use of these terms.

⁷ To the contrary, women participate in and direct the numerous civic, personal development, and leadership programs which the Minneapolis and St. Paul Jaycee chapters offer. T. 57-60. Women thereby promote and foster the growth and development of the Jaycees.

change such references in the Jaycees' creed as the "brotherhood of man."⁸ A. 24.

First amendment decisions of this Court do not accord freedom of association independent constitutional status but rather have treated it as a derivative protection which allows individuals to join together "to pursue goals independently protected by the first amendment."⁹ See also *Garcia v. Texas State Board of Medical Examiners*, 421 U.S. 995 (1975), affirming, 384 F. Supp. 434 (W.D. Tex. 1974) (summary affirmation of a decision that rejected a freedom of association claim in the absence of a challenge to an underlying first amendment freedom); *Baker v. Nelson*, 409 U.S. 810 (1972), appeal dismissed, 291 Minn. 310, 191 N.W.2d 185 (1971). (Minn. Sup. Ct. rejected claim that ban on same-sex marriage violated first amendment). Compare *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) with *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974). Moreover, in two cases involving racial discrimination, this Court has summarily rejected the argument that such conduct by private individuals, in one instance private schools and in the other a union, can be shielded by the claim that the first amendment "freedom of association" permits individuals to construct racial barriers to entrance into these organizations. *Runyon v. McCrary*, 427 U.S. 160, 175-176 (1976); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945).

⁸ In pertinent part the Jaycees' creed expresses a belief that:

The brotherhood of man transcends the sovereignty of nations; that economic justice can best be won by free men through free enterprise; that government should be of laws rather than of men . . .

P. Exh. J. Future female members may believe that these references are not gender specific but rather to a secondary meaning of the terms, i.e., mankind, the human race.

⁹ L. Tribe, *American Constitutional Law* 702 (1978).

The state-mandated transformation of the Jaycees from a young men's organization to a young people's organization is not an abridgement of the first amendment right of free association because that change does not interfere with or impede a group goal which has first amendment significance. Thus the lower court's conclusion that the state abridged the Jaycees' freedom of association is based either upon an improper view as to the independent nature of that freedom, a view never taken by this Court, or unsupported by the record and hence clearly erroneous.

B. The State's Interest In Prohibiting Sex Discrimination In Public Accommodations Is Compelling And Thus Justifies Its Interference With Jaycees' Membership Requirements.

The lower court has agreed that the state's interest in clearing "the channels of commerce of the irrelevancy of sex, to make sure that goods and services and advancement in the business world are available to all on an equal basis" is a public purpose of "the first magnitude."¹⁰ A. 27. Despite making this determination, the lower court concluded that the state's interest was insufficient to override what it viewed as a significant intrusion into the Jaycees' freedom of association.

¹⁰ In *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960), this Court indicated that a "significant encroachment" by the government into a first amendment freedom is permissible upon showing an interest which is "compelling." Similar formulations occur in *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) and *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). As was argued above, state interference with Jaycees' activities does not rise to the level necessary to merit the use of these tests.

The court first concluded that the state interest was impaired "only to a limited extent." A. 28. It noted that "places of public accommodation in the ordinary sense of business establishments" remain subject to the "full vigor of of the law It is only the Jaycees' membership practices that would be affected if this particular application of the state public accommodations law is prohibited." *Id.* The Jaycees' sexually discriminatory sale of memberships would, however, remain undisturbed. As Judge Lay correctly noted in dissent, this circular reasoning "rests on an implied disagreement with the findings of the Minnesota Supreme Court that the Jaycees is a statutory 'place of public accommodation.'" A. 42-43. It is precisely this sale of membership by a public accommodation, not only the Jaycees' community activities, which the state seeks to regulate.

Continuing with this reasoning "that the state interest being asserted is the interest in freedom from discrimination in public accommodations generally," the lower court found that the nature of the state's interest is reduced because it has not shown "that membership in the Jaycees was the only practicable way for a women to advance herself in business or professional life" A. 28. More disturbing than the harsh proof burden to which the majority thus puts the state¹¹ is the disquieting refrain of "separate but equal" which is sounded by this opinion. The majority seems to be

¹¹ Although the record does not show, if ever such a showing could be made, that the Jaycees is the only way for a woman to advance herself in a business or chosen profession, it does contain the testimony of three women from the Minneapolis and St. Paul Jaycee chapters. These women obtained, contrary to the Jaycees' by-laws, equal membership rights. Their testimony regarding the role which the Jaycees played in their career advancement is almost of classic success story proportions. See A. 100-102.

suggesting that the state's interest is satisfied if nondiscriminatory alternatives to the Jaycees are available to women. What this analysis overlooks, of course, is the "deprivation of personal dignity that surely accompanies denials of equal access to public establishments."¹² It would be ironic if as this country struggles "to escape from the shackles of the 'separate but equal' doctrine of *Plessy v. Ferguson*"¹³ in the area of racial discrimination, those same bonds were to be fixed to the wrists of women.

Moreover, the showing which the majority would have the state make may be so elusive as to escape demonstration. It is more an exercise in metaphysics than in fact finding to attempt to prove the precise degree to which Jaycees training is of benefit to a women's professional development.¹⁴ Therefore, unless the lower court's "separate but equal" test is to be used, it should have been sufficient for the state to have demonstrated, as it did, that equal access to Jaycees membership is as beneficial for women as it is for men.¹⁵

¹² *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964). See also *Sail'r Inn, Inc. v. Kirby*, 5 Cal. 3rd 1, 19, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340-41 (1971) and cases cited therein.

¹³ *Bob Jones University v. United States*, 103 S. Ct. 2017, 2029 (1983).

¹⁴ See generally C. Jencks, *Inequality—A Reassessment of the Effect of Family and Schooling in America*, 191-92 (1972) (predicting a man's occupational status is like predicting his life expectancy: certain measurable factors make a difference, but they are by no means decisive).

¹⁵ The United States Bureau of Labor Statistics has indicated that almost one-third of all jobs held by males come through personal contacts. *Job Seeking Methods Used by American Workers*, Bull. No. 1386, U. S. Bureau of Labor Statistics, Table III (1972). The Jaycees undoubtedly provides an opportunity for men and women to establish such contacts. If experience helps destroy the stereotypes upon which discrimination flourishes, does it not serve a compelling state interest to have these contacts occur with men and women meeting as equals?

Another factor which in the opinion of the lower court diluted the state's interest was its belief that the public accommodations provision of the Minnesota Human Rights Act was being applied "selectively" to the Jaycees and not to any of the "hundreds of private (in the sense of nongovernmental) associations in this country whose membership is limited either to men or to women." A. 29. Underlying this observation is another example of the court's unwillingness to accept the Minnesota Supreme Court's characterization of the Jaycees as a "public accommodation." In addition, the lower court made the serious factual error that these other groups would constitute public accommodations. Although the record adequately demonstrates why the Jaycees is such an organization, it is empty of sufficient facts to permit this designation of any other organization.¹⁶

Finally, the lower court indicated that state objectives could be met by use of less restrictive alternatives, "ways less directly and immediately intrusive on the freedom of association than outright prohibition," i.e., no tax credits, no membership or appearances by public officials. These options are mislabeled. A properly designated "less restrictive alternative" is one which allows attainment of an objective in a manner which minimizes infringement on a first amendment activity, e.g., reasonable time, place, or manner restrictions on picketing as opposed to a ban on all such activity. The

¹⁶ This "selective prosecution" argument was raised but never pursued by the Jaycees in the trial court. *United States Jaycees v. McClure*, 534 F. Supp. 766, 768, n. 6 (D. Minn. 1982). (A. 19.) This decision by the Jaycees precluded the state from demonstrating whether any charges were filed with it concerning other membership groups and from demonstrating that its enforcement activities were directed at other equally compelling interests protected by the Minnesota Human Rights Act. See *Oyler v. Boles*, 386 U.S. 448, 456 (1962).

alternatives offered by the lower court have the same purpose as does Minnesota's statutory ban on sex discrimination in public accommodations. Each seeks to force the Jaycees to allow women equal access to that organization. The methods suggested by the court are thus not less restrictive, they are merely less effective.

C. The Minnesota Supreme Court's Opinion In *McClure v. United States Jaycees* Does Not Create An Unconstitutionally Vague Distinction Between Public Accommodations And Private Membership Organizations.

The lower court concluded that the Minnesota Supreme Court introduced an unconstitutionally vague standard into the public accommodations provision of the Minnesota Human Rights Act because its opinion in *United States Jaycees v. McClure* "supplies no ascertainable standard for the inclusion of some groups as 'public' and the exclusion of others as 'private.'" A. 41. The court did not find the phrase "place of public accommodation" to be vague. Instead it assigned that vice to the following portion of the supreme court's opinion:

Private associations and organizations—those, for example, that are selective in membership—are unaffected by Minn. Stat. § 363.01(18) (1980) [the definition of a public accommodation]. Any suggestion that our decision today will affect such groups is unfounded.

We, therefore, reject the national organization's [Jaycees] suggestion that it be viewed analogously to private organizations such as the Kiwanis International Organization. Instead, we look at what this national organization is by itself.

First, the Minnesota Supreme Court did not hold "that the Kiwanis is 'private' and therefore not subject to the law." Instead it merely refused to accept arguments offered to it by the Jaycees that its organization and methods of operation were similar to those of the Kiwanis.¹⁷ A. 80, 82-83. This rejection of one party's argument is simply that, not a statutory construction which has created a decisional gloss on the statute. The Minnesota Supreme Court has not held that the Kiwanis is private. It has merely rejected the Jaycees' suggestion that it is as private as the Kiwanis.

Second, the distinction which the Minnesota Supreme Court drew between public accommodations and private clubs is one which is well established in decisional law.¹⁸ A. 82. Measured against that standard, the Jaycees cannot be termed a private club. The supreme court's reliance upon such cases to form the outlines of its public business-private association distinction does not leave the Jaycees "to guess as to how it might change itself in order to become 'private.'" A. 38. See *Grayned v. City of Rockford*, 408 U.S. 104, 110-12 (1972).

¹⁷ This argument was made to the administrative hearing examiner who rejected it on the basis that there was insufficient evidence to support the comparison. See A. 105, 122-123. The record of this hearing is the only documentary evidence which the Minnesota Supreme Court had before it in deciding *McClure*.

¹⁸ See *Wright v. Salisbury Club*, 632 F.2d 309, 311, 313 (4th Cir. 1980) (42 U.S.C. § 1981); *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131-33 (5th Cir. 1980) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b)(2)); *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174, 1175-76 (E.D. Wisc. 1979) (Title II, 42 U.S.C. § 2000a(e)); *Fesel v. Masonic Home of Delaware, Inc.*, 428 F. Supp. 573, 577-78 (D. Del. 1977).

CONCLUSION

Ten years ago the Minnesota Legislature extended the protection of the Minnesota Human Rights Act from sex discrimination in employment to a similar prohibition in housing and real property, public accommodations, public services and education. Minn. Laws 1973, ch. 729 § 3. The legislature recognized that equality for women could not be achieved simply by providing them equal job opportunities. The decision of the lower court now looms as an impediment to the state's comprehensive scheme to eliminate sex discrimination.

The Jaycees claims that one value of its organization is that it builds tomorrow's leaders today. Women should have access to that social training ground. They should be able to meet and compete with men in that arena. To brand them with second class status or to discourage them from joining that organization helps to perpetuate the myth that women are inferior and tarnishes the promise of the state to its citizens that they will be free from discrimination. For these reasons

and for the reasons above regarding the merits of the lower court's decision, appellants request that this Court either summarily reverse the lower court or note probable jurisdiction.

Respectfully submitted,

HUBERT H. HUMPHREY, III

Attorney General

State of Minnesota

KENT G. HARBISON

Counsel of Record

Chief Deputy

Attorney General

102 State Capitol Building

St. Paul, Minnesota 55155

Telephone: (612) 296-2351

Of Counsel:

RICHARD L. VARCO, JR.

Special Assistant

Attorney General

1100 Bremer Tower

Seventh Place at

Minnesota Street

St. Paul, Minnesota 55101

Telephone: (612) 296-7862

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Office - Supreme Court, U.S.

FILED

OCT 31 1983

ALEXANDER L. STEVAS.

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY III, Attorney
General of the State of Minnesota;
and GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of
itself and its qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**APPENDIX TO APPELLANTS'
JURISDICTIONAL STATEMENT**

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
KENT G. HARBISON
Counsel of Record
Chief Deputy
Attorney General
102 State Capitol Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2351
Counsel for Appellants

Of Counsel:
RICHARD L. VARCO, JR.
Special Assistant
Attorney General
State of Minnesota

October 31, 1983

CONTENTS

	Page
Opinion of the United States Court of Appeals for the Eighth Circuit dated June 7, 1983	A-1
Memorandum Opinion and Order for Judgment of the United States District Court dated March 25, 1982 ...	A-52
Opinion of the Minnesota Supreme Court dated May 8, 1981	A-69
Findings of Fact, Conclusions of Law, Order, Exhibit List, and Memorandum of Hearing Examiner George A. Beck of the Minnesota Office of Hearing Examiners dated October 9, 1979	A-93
Order of the United States Court of Appeals for the Eighth Circuit denying petition for rehearing and suggestion for rehearing en banc dated August 1, 1983	A-131
Notice of Appeal to the Supreme Court of the United States, filed October 7, 1983	A-134

APPENDIX

No. 82-1493

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**The United States Jaycees, a non-profit Missouri
corporation, on behalf of itself and its qualified members,
Appellant,**

VS.

**Marilyn E. McClure, Commissioner, Minnesota
Department of Human Rights; Warren Spannaus,
Attorney General of the State of Minnesota;
and George A. Beck, Hearing Examiner of
the State of Minnesota,
Appellees.**

**On Appeal from the United States District Court for the Dis-
trict of Minnesota.**

Submitted: November 11, 1982

Filed: June 7, 1983

**Before LAY, Chief Judge, HENLEY, Senior Circuit Judge,
and ARNOLD, Circuit Judge.**

ARNOLD, Circuit Judge.

**The United States Jaycees, a young men's civic and service
organization, does not admit women to full membership. A
Minnesota statute, as amended in 1972, forbids discrimination
on the basis of sex in "places of public accommodation."**

Minn. Stat. Ann. §§363.01 subd. 18, 363.03 subd. 3. The Supreme Court of Minnesota has interpreted this phrase to include the Jaycees, and the Minnesota Department of Human Rights has ordered the Jaycees to admit women to its local chapters in Minnesota. In this suit brought by the Jaycees, we are asked to declare the statute, as so applied and interpreted, unconstitutional, as in violation of the rights of speech, petition, assembly, and association guaranteed by the First and Fourteenth Amendments.

We hold that the Jaycees, a substantial part of whose activities involve the expression of social and political beliefs and the advocacy of legislation and constitutional change, does have a right of association protected by the First Amendment. In our opinion, the interest of the state, in the circumstances of this case, is not strong enough to deserve the label "compelling," so as to override this right. In addition, the state law is unconstitutionally vague. The Jaycees is therefore entitled to an injunction restraining the state from efforts to prohibit its membership policy under state law as presently written. This is not to say that no state law could be written to redress this kind of nongovernmental discrimination. Still less do we intend to express our own view of what the Jaycees is doing. But if, in the phrase of Justice Holmes, the First Amendment protects "the thought that we hate," it must also, on occasion, protect the association of which we disapprove. The First Amendment guarantees freedom of choice in a certain area. That freedom must, on occasion, include the freedom to choose what the majority believes is wrong. For reasons to be described, we think this is one of those occasions.¹

¹ The Jaycees' refusal to admit women has given rise to several other court or agency opinions. See *Junior Chamber of Commerce of Kansas City, Missouri v. Missouri State Junior Chamber of*

I

The United States Jaycees is a nonprofit corporation organized under the laws of Missouri. Its national headquarters is in Tulsa, Oklahoma. It is a private (in the sense of nongovernmental) membership organization. It receives no federal or state funds, though it is exempt from federal income taxation under Section 501 of the Internal Revenue Code. At the time of the trial before the District Court in August of 1981, the Jaycees had about 295,000 regular members in 7400 local chapters. Article 2 of the Jaycees' By-Laws sets out the organization's purpose:

A. This Corporation shall be a non-profit Corporation, organized for such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United

Commerce, 508 F.2d 1031 (8th Cir. 1975) (receipt of federal funds (a practice since discontinued) does not make Jaycees a governmental actor for purposes of the Fifth Amendment); *New York City Jaycees, Inc. v. The United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975) (same); *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*, 495 F.2d 883 (10th Cir.), cert. denied, 419 U.S. 1026 (1974) (same); *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. App. 1981) (Jaycees is not a "place of public accommodation" within the meaning of the D.C. Human Rights Act of 1977, D.C. Code §6-2241(a)(1) (Supp. 1978)); *Richardet v. Alaska Jaycees*, No. 3AN-79-424 CIV (Super. Ct. 3d Jud. Dist. of Alaska Sept. 15, 1980) (Jaycees is a place at which amusement or business services or commodities are offered to the public within the meaning of the Alaska public-accommodations law, Alaska Stat. §§18.80.230(1), .300(7)); *Fletcher v. U.S. Jaycees*, No. 78-BPA-0058-0071 (Mass. Comm'n Against Discrimination Jan. 27, 1981) (Jaycees is a place of public accommodation within the meaning of Mass. Gen. Laws Ann. ch. 272, §§92A, 98).

The question has also been vigorously debated within the organization. On three occasions a resolution favoring the admission of women has been defeated, but each time a larger minority has voted for it.

States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.

B. Towards these ends, this Corporation shall adopt the following as its Creed:

We believe

That faith in God gives meaning and
purpose to human life;

That the brotherhood of man transcends
the sovereignty of nations;

That economic justice can best be won by
free men through free enterprise;

That government should be of laws rather
than of men;

That earth's great treasure lies in human
personality;

And that service to humanity is the best
work of life.

This case centers around the Jaycees' requirements for membership. Article 4 of the By-Laws creates seven classes of membership, including Individual Members, also known as regular members, Associate Individual Members, and Local Organization Members, that is, local chapters. Between 1975 and 1978 women were permitted to become regular members in a few states² as part of a "pilot program," but the experi-

² The Minnesota State Jaycees voted not to participate in the pilot program.

ment was discontinued in 1978. As matters now stand, Article 4-2 of the By-Laws establishes the following requirements for regular membership:

Young men between the ages of eighteen (18) and thirty-five (35), inclusive, of Local Organization Members in good standing in this Corporation shall be considered Individual Members of this Corporation (unless the ages for membership shall have been changed by the State Organization Member as hereinabove permitted by By-Law 4-4.A.).³ Such Individual Members shall be qualified by, and represented through, the Local Organization Member so long as he shall pay the dues to the Local Organization Member specified in its by-laws, constitution or articles of incorporation (which shall include a subscription to FUTURE magazine).

Associate Individual Members may be businesses, associations, groups, or individuals, such as men over 35 or women, who are not eligible for regular membership. Associate members may not vote or hold office, but they may otherwise participate fully in Jaycee activities, except that they may not receive certain national awards. Local chapters must be "young men's organization[s] of good repute . . . organized for purposes similar to and consistent with those of this Corporation" By-Laws Art. 4-4A. The constitution, certificate of incorporation, and by-laws of local chapters must be consistent with and subject to the national and State by-laws, *id.* Art. 4-4C2; local chapters that change their rules so as to be inconsistent with the national by-laws may have their charters revoked, *id.* Art. 4-4F; and local chapters who

³ Under By-Law Art. 4-4A a State Organization may restrict the minimum age of regular members to an age more than 18 but not more than 21.

lose their charter are forbidden to continue using the name "Jaycees," *id.* Art. 4-4I.

In 1974 the Minneapolis and St. Paul, Minnesota, local chapters began accepting women as full-fledged individual members. The U.S. Jaycees threatened to revoke the charters of these local organizations because of this infraction of its rules. Members of the Minneapolis and St. Paul chapters then, late in 1978, filed complaints with the Minnesota Department of Human Rights, a state agency created by statute to enforce the Minnesota Human Rights Act, Minn. Stat. Ann. §§363.01-.14. The complaints alleged that the Jaycees' exclusion of women from full membership violated Minn. Stat. Ann. §363.03 subd. 3, which read as follows:

Subd. 3. *Public Accommodations.* It is an unfair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex. It is an unfair discriminatory practice for a taxicab company to discriminate in the access to, full utilization of or benefit from service because of a person's disability.

The term "place of public accommodation" is defined in Minn. Stat. Ann. §363.01 subd. 18:

Subd. 18. *Public Accommodations.* "Place of accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

On January 25, 1979, the Commissioner of the Department of Human Rights found probable cause to believe that the statute had been violated and ordered that an evidentiary hearing be held before a state hearing examiner. On February 27, 1979, the Jaycees brought suit in the United States District Court for the District of Minnesota, seeking declaratory and injunctive relief against the enforcement of the Human Rights Act. The plaintiff claimed that application of the Act to force it to accept women as regular members would violate its rights of speech and association under the First and Fourteenth Amendments to the Constitution of the United States. It asked the District Court to abstain from deciding the constitutional question until the state administrative agency had decided whether the Jaycees fit the definition of "place of public accommodation" in the state law. The District Court, with the agreement of all parties, dismissed the suit without prejudice, stating that it could be renewed if the state administrative decision turned out to be adverse to the Jaycees. The parties continue to agree on this procedure, under which the state forum decides the meaning of the statute, and the federal courts decide its validity under the federal Constitution.⁴

⁴ This procedure is said to be in accord with *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). But in *England* the federal suit was brought long before any state proceedings had begun, see 375 U.S. at 413 n.1. *England* holds only that parties remitted to the state forum under the doctrine of abstention to get an authoritative construction of state law, may thereafter return to the federal courts to litigate their federal constitutional claim. We are not sure that it is properly applied to a case in which state enforcement proceedings have already been instituted. In such a case, the state officials might well argue that the federal courts should bow out altogether, under the rule of *Younger v. Harris*, 401 U.S. 37 (1971), leaving the plaintiff to pre-

The state agency proceeding thereupon went forward, and an evidentiary hearing was held before a hearing examiner. Following the hearing, the examiner filed findings of fact and conclusions of law. He held that "the United States Jaycees are a place of public accommodation" and that the Jaycees had committed an unfair discriminatory practice. *State of Minnesota, by William L. Wilson, and his successor, Marilyn E. McClure, Commissioner, Department of Human Rights v. The United States Jaycees*, No. HR-79-014-GB, slip op. p. 9 (Minn. Office of Hearing Examiners, for the Dept. of Human Rights, findings, conclusions, and order filed October 9, 1979). The examiner entered the following order, *id.* at 9-10:

It is hereby ordered that the United States Jaycees shall cease and desist and is hereby enjoined from:

(1) Revoking the charter of any Jaycee local organization member ("local chapter") or state organization member (the "Minnesota Jaycees") within the State of Minnesota or denying any privilege or right of membership, or otherwise discriminating in any manner against a local or state organization member within the State of Minnesota because either extends to women all the rights and privileges of individual and regular membership.

sent all of its arguments, state and federal, to the state administrative agency, to the state courts on review of the agency's decision, and then to the Supreme Court of the United States on appeal from or certiorari to the Supreme Court of the state. The defendants here have never made this suggestion. *Younger* is a doctrine of equitable discretion, not of subject-matter jurisdiction, and it can hardly have been an abuse of discretion for the District Court (or this Court) to decide the merits of plaintiff's federal claim when both sides urge precisely that.

(2) Discriminating on the basis of sex against any member or applicant for membership of a Jaycee local chapter within the State of Minnesota with respect to the terms, conditions, or privileges of membership in the local chapters or in the Minnesota Jaycees or in the United States Jaycees.

The Jaycees then came back to the District Court and, on October 31, 1979, filed the present suit, asking that the enforcement of the state agency's order be enjoined on federal constitutional grounds. The District Court certified to the Supreme Court of Minnesota the following question of state law:

Is the United States Jaycees a "place of public accommodation" within the meaning of Minn. Stat. §363.01 Subdivision 18?

In an opinion filed on May 8, 1981, the Supreme Court of Minnesota answered yes. *United States Jaycees v. McClure*, 305 N.W.2d 764 (1981) (6-3 decision). The Court held that the plaintiff organization is "a business . . . facility . . . whose goods, . . . privileges, [and] advantages are . . . sold or otherwise made available to the public." See *id.* at 772. Men between 18 and 35 are indiscriminately admitted to membership, it said, without any selectivity. The organization is in the business of selling memberships, a business it assiduously promotes. Commercial language, *e.g.*, "marketing," is used to describe the recruitment of new members, and recruitment is heavily emphasized. There is no evidence that any man between 18 and 35 who wished to join the Jaycees has ever been refused. The leadership skills and personal-development techniques promised to new members if they become active Jaycees are the goods and advantages

that members buy when they pay their dues. The Court disclaimed any intention to affect "private organizations such as the Kiwanis International Organization":

Private associations and organizations—those, for example, that are selective in membership—are unaffected by Minn. Stat. §363.01(18) (1980). Any suggestion that our decision today will affect such groups is unfounded.

We, therefore, reject the [Jaycees] national organization's suggestion that it be viewed analogously to private organizations such as the Kiwanis International Organization.

Id. at 771.

Chief Justice Sheran, joined by Justices Peterson and Todd, dissented. The Chief Justice said:

Although the result reached in the majority opinion is felicitous, I cannot believe that the members of the Minnesota legislature who voted for the law we have been called upon to construe thought the Junior Chamber of Commerce, a service organization, to be "a place of public accommodation." The obligation of the judiciary is to give that meaning to words accorded by common experience and understanding. To go beyond this is to intrude upon the policy-making function of the legislature. The majority opinion does that in this case to a degree which compels this expression of dissent.

Id. at 774.

The parties then returned to the District Court, which conducted an additional evidentiary hearing. On March 25, 1982, the District Court filed its opinion holding the Jaycees' constitutional claims without merit and dismissing the complaint with prejudice. *United States Jaycees v. McClure*, 534

F. Supp. 766 (D. Minn. 1982). The Court first considered whether the Jaycees' claimed "right to 'associate for the purpose of advancing only the interests of young men,'" *id.* at 770, was part of the freedom of association protected by the First Amendment. The Court noted that "[i]t is questionable whether association not directed at the exercise of other First Amendment rights enjoys constitutional protection," *ibid.*, but concluded that it need not resolve that question, because "if there is such a right, it has not been unconstitutionally denied to the Jaycees." *Ibid.* Two related reasons were given for this conclusion: that invidious private discrimination is not entitled to affirmative constitutional protection, and that the State's interest in preventing discrimination in access to public accommodations is in any event sufficiently compelling to override whatever right of association exists. The Court stressed, as had the Minnesota Supreme Court, that the Jaycees holds itself out as a leadership training organization, giving members an advantage in business and civic advancement. It characterized the process of recruitment as the sale of memberships. "The Jaycees itself refers to its members as customers and membership as a product it is selling." *Id.* at 769.

The District Court also rejected the Jaycees' arguments based on vagueness and overbreadth. As to vagueness the Court held that the "term 'place of public accommodation' when construed with normal aids to statutory construction can be understood by those of common understanding to apply to the Jaycees," *id.* at 773, especially in light of the opinion of the Minnesota Supreme Court. The overbreadth challenge was also rejected. As construed by the Supreme Court of Minnesota, "the statute is only applicable to public business facilities which practice sex discrimination." The

District Court rejected the argument that the statute as interpreted by the Supreme Court might apply to other organizations, "including the Boy Scouts, the Kiwanis, the Sweet Adelines, and the like," because "[t]here is insufficient evidence in the record pertaining to the activities of these groups to allow any determination whether the statute would apply to them and whether the groups engage in protected First Amendment activity." *Id.* at 773.

The plaintiff appeals, pressing again its threefold claim that the Minnesota Human Rights Act, as construed by the Supreme Court of Minnesota, violates its freedom of association, is void for vagueness, and is unconstitutionally overbroad.

II

The First Amendment, which the Fourteenth has made applicable to the states, reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Amendment does not contain the word "association," nor does any other portion of the Constitution, as, for example, the Ninth Amendment or the Due Process Clause of the Fourteenth Amendment, protect by express words any "right" or "freedom" "of association." [sic] Defendants argue that association is constitutionally protected only as an incident of the specific rights listed in the First Amendment—religion, speech, press, and assembly to petition for redress of grievances. Since the Jaycees is nothing more than a business selling memberships and leadership training, they

argue, it has no right to First Amendment protection, except possibly the lesser degree of protected status enjoyed by purely commercial speech. Our first task, therefore, is to determine to what extent freedom of association is constitutionally protected, and whether the Jaycees' activities qualify for whatever protection the law affords. We of course take as a given that the Jaycees is a "place of public accommodation" within the meaning of the Minnesota statute. The Supreme Court of Minnesota has answered that question, and it has the last word. Its "construction fixes the meaning of of the statute [and] . . . puts . . . words in the statute as definitely as if it had been so amended by the legislature." *Winters v. New York*, 333 U.S. 507, 514 (1948). On the further question, though, whether the activity in question, whatever its significance under state law, is protected by the federal Constitution, we are not concluded by the opinion of the state court. We must decide that issue for ourselves. "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

A.

Many of the cases that have discussed freedom of association have arisen in the context of speech or political activity that is at the core of the First Amendment. *NAACP v. Alabama*, 357 U.S. 449 (1958), is such a case. There, the Supreme Court struck down a state-imposed requirement that the names of members of a politically unpopular group be made public, on the ground that the group's advocacy of political and legal change would thereby be unacceptably retarded. Similar protection has been extended to group use of litigation as a means for changing the law. *NAACP v. Button*, *supra*. See also *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)

(per curiam) (association in support of political candidates). We know of no Supreme Court opinion, however, that rigidly limits the right of association to the context of political beliefs or expression. On the contrary, *NAACP v. Alabama* itself states that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U.S. at 460-61. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.* at 460.

Other cases go well beyond any concrete connection with the specific language of the First Amendment in describing the right of association. In *Shelton v. Tucker*, 364 U.S. 479 (1960), for example, the Court had before it an Arkansas statute requiring every teacher in a state-supported school or college, on pain of dismissal, to file each year an affidavit listing every organization to which he or she had belonged or regularly contributed within the last five years. The law was held invalid. The Court noted, among other things, that the statute "requires [teachers] to list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness." *Id.* at 488. The Court declared that "to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a

right which, like free speech, lies at the foundation of a free society." *Id.* at 485-86. The Court may have suspected—and not without reason—that the statute under attack was part of a broader scheme to thwart the efforts of the NAACP to enforce the law of school desegregation. But the opinion is not placed on that ground (in fact, one of the plaintiffs went so far as to aver that he did *not* belong to the NAACP), and the Court does not imply that nonpolitical associations or groups ("social, professional, . . . avocational," *id.* at 488) are less protected than political or religious ones. Rather, the right of association is portrayed as a "fundamental personal libert[y]," *ibid.*, which the state may not broadly stifle if less drastic means are available to serve its legitimate purposes.

A more striking case is *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967). The Supreme Court of Illinois, purporting to exercise the power to regulate the practice of law that courts had possessed (or thought they had) from time immemorial, had forbidden the United Mine Workers to employ a salaried attorney to prosecute workers' compensation claims for union members who "wished his services." *Id.* at 218. Such conduct, the Illinois courts thought, amounted to the unauthorized practice of law. The Supreme Court reversed and held the union's conduct protected by the First and Fourteenth Amendments. An attempt to distinguish *NAACP v. Button*, *supra*, "as concerned chiefly with litigation that can be characterized as a form of political expression" was rejected. 389 U.S. at 221. "We do not think our decisions in [*Railroad*] *Trainmen v. Virginia Bar*, 377 U.S. 1 (1964),] and *Button* can be so narrowly limited. We hold that freedom of speech, assembly, and peti-

tion guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." 389 U.S. at 221-22 (footnote omitted). "The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *Id.* at 223.

Griswold v. Connecticut, 381 U.S. 479 (1965), contains perhaps the broadest statement of the right of association, though it may be dictum. "The association of people is not mentioned in the Constitution nor in the Bill of Rights," Justice Douglas said for the Court. "Yet the First Amendment has been construed to include" that right. *Id.* at 482. "[W]e have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members." *Id.* at 483. The Court added, in words that have definite implications for the case before us:

The right of "association," like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

Ibid. (citation omitted). Cf. *Healy v. James*, 408 U.S. 169, 181 (1972); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577-79 (plurality opinion of Burger, C.J., joined by White and Stevens, JJ.) (there is a right to assemble in

public places for any lawful purpose; the Constitution recognizes certain "important rights not enumerated," including "the rights of association and of privacy").

Our own cases have recognized a right of association in similar broad terms.⁵ In *American Federation of State, County, and Municipal Workers v. Woodward*, 406 F.2d 137 (8th Cir. 1969), we held that the discharge of public employees on account of union activities was a violation of the First Amendment. "The First Amendment protects the right of one citizen to associate with other citizens for any lawful purpose free from government interference." *Id.* at 139. The broad language from *Griswold*, just quoted in this opinion, was cited as authority for that proposition. *Gay Lib v. University of Missouri*, 558 F.2d 848, rehearing *en banc* denied by an equally divided Court, 558 F.2d 859 (8th Cir. 1977), upheld the right of a student organization "comprised largely of homosexuals," *id.* at 850, to recognition by a university, despite the fact that homosexual conduct was a crime under the law of Missouri, a law whose validity the Court did not seem to question at the time. We quoted the passage from Justice Harlan's opinion in *NAACP v. Alabama*, *supra*, holding that freedom to associate for the purpose of advancing cultural beliefs is protected, 558 F.2d at 856, and we noted that the purpose of *Gay Lib* was not alone to advocate changes in the law—an activity within the narrowest interpretation of the First Amendment—but also to allow its members an opportunity for "meeting one another to discuss their common problems and possible solutions to those prob-

⁵ The District Court observed that "Certain language in decisions of this circuit . . . suggests that freedom of association itself may be a 'basic constitutional freedom.'" 534 F. Supp at 770. We agree.

lems" *Id.* at 853 n.9 (quoting *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976)). See also *Greminger v. Seaborn*, 584 F.2d 275, 278 (8th Cir. 1978) ("Freedom of association includes membership in unions or other organizations concerned with 'business or economic causes.'" (quoting *AFSCME v. Woodward*, *supra*, 406 F.2d at 139)).

We must be properly cautious, of course, about drawing broad conclusions from rather general statements in court opinions. The context in which a statement is made always colors or limits the apparent generality of the statement, to a greater or lesser degree. The job of courts is to decide cases. We do not write texts or law-review articles. But this much at least seems tolerably clear from our canvass of the Supreme Court's and our own opinions in this area: There are rights protected by the federal Constitution that are not specifically spelled out in so many words in that document. Among these rights is the right or freedom of association, and this right has not been rigidly limited to groups whose activities fall clearly within the specific guarantees of the First Amendment. One kind of association, *e.g.*, a political party, see *Cousins v. Wigoda*, 419 U.S. 477 (1975), may enjoy a greater degree of protection than another. It may be, for example, that association for ends specifically mentioned in the First Amendment will prevail against all state interests not regarded as "compelling," while other kinds of association may be required to yield to less imperative demands of public policy. The latter species of association, on this view, would be protected not by the specific guarantees of the Bill of Rights, but by the more nebulous concept of substantive due process, an oxymoron if there ever was

one.⁶ Before deciding how far we must pursue this excursion into constitutional theory, however, we return to the specifics of this case, and inquire just what kind of association is involved here.

B.

Defendants' description of the Jaycees is simple and logical: The plaintiff organization is simply a business selling memberships, and the leadership training that goes with them, indiscriminately to any man between 18 and 35 who wishes to buy. The activity is purely commercial, and the State has the undoubted power to purge it of discrimination on the basis of irrelevant personal characteristics like sex. If the facts were as asserted, this case would be easy. No extended analysis would be necessary to show that the Jaycees must lose. With all deference to those who have reached a contrary conclusion, however, our study of the record leads us to the definite and firm conviction that this view of the Jaycees is so partial as to be distorted. The organization does not fit the bed of Procrustes that the defendants designed for it.

Certainly the Jaycees vigorously recruits new members, and stresses the supposed benefits of membership to its prospects' business careers as well as to their personal lives. Its activities are said to train members to manage their time better, to speak better, and to be better citizens. The term "marketing" has been used to describe this promotional process, and by using that and similar language the Jaycees

⁶ This seems to be what Professor Tribe means when he suggests that association unrelated to the specific guarantees of the First Amendment "has been protected, if at all, only as an aspect of the less well pedigreed rights of privacy and personhood . . ." Tribe, *American Constitutional Law* 701 (1977).

has been to some extent justifiably hoist with its own petard. So far the similarities with, say, the Dale Carnegie organization are plain. But much more is involved here. The Jaycees does not simply sell seats in some kind of personal-development classroom. Personal and business development, if they come, come not as products bought by members, but as by-products of activities in which members engage after they join the organization. These activities are variously social, civic, and ideological, and some of them fall within the narrowest view of First Amendment freedom of association.

Some of what local chapters do is purely social. They have parties, with no purpose more complicated than enjoying themselves. Some of it is civic. They have conducted a radio fund-raising drive to combat multiple sclerosis. They have conducted a women's professional golf tournament. They have engaged in many other charitable and educational projects for the public good. (And there is no claim, incidentally, of any discrimination in the offering to the public of the benefits of these projects. Money raised to fight disease, for example, is not used to benefit only male patients.) And they have advocated, through the years, a multitude of political and social causes. Governmental affairs is one of the chief areas of the organization's activity. Members on a national, state, and local basis are frequently meeting, debating issues of public policy, taking more or less controversial stands, and making opinions known to local, state, and national officials.

The record contains many examples of this political and ideological activity. We mention only a representative selection. The By-Laws and Policy Manual in effect at the time of trial in the District Court contains, even before the By-Laws

themselves, four "Declarations of External Policy" adopted by the membership as represented in national convention. These resolutions support a balanced budget, a fund drive to fight muscular dystrophy and juvenile diabetes, legislation to permit "voluntary prayer in American schools," and the economic development of Alaska. All of these propositions, except the second one, relate to highly controversial political questions. The prayer policy recites, for example, that "the framers of our Constitution never meant for [sic] federal restrictions on free exercise of religious practice or speech" and that "[t]he United States Jaycees is built on a foundation of faith, as witnessed by the first line of the Jaycee Creed, 'We believe that faith in God gives meaning and purpose to human life.' "

Over the years, the national organization has taken stands in favor of the draft, the efforts of the FBI "to eliminate disloyalty" in this country before World War II, the formation of the United Nations, an increase in the corporate income tax, the recommendations of the Hoover Commission on reorganization of the federal government, the ratification of the Panama Canal Treaty, the 18-year-old vote, the vote for citizens of the District of Columbia, the "defense of freedom" in Vietnam, and (apparently at a later time) the withdrawal of U.S. troops from Southeast Asia. It has opposed "one-man" congressional committees, "socialized medicine," federal funds for teachers' salaries and school construction, and pornography. More recently, the Jaycees has embarked on a nation-wide program in support of President Reagan's economic policies, called "Enough is Enough," and it has advocated passage of a bill to limit the appellate jurisdiction of the Supreme Court in cases involving "voluntary

prayer." Local and state groups have also taken political stands. Sixteen state organizations have asked their respective legislatures to join in calling a constitutional convention to adopt a balanced-budget amendment to the Constitution of the United States—an activity within the most literal reading of the Assembly Clause of the First Amendment. State and local Jaycee groups have advocated a reduction in the size of the Minnesota Legislature, a bill to save seals, and a change in the form of city government in El Dorado, Arkansas. These and similar actions are reported from time to time in a magazine called *Future*, published by the Jaycees.

The Jaycees is not a political party, or even primarily a political pressure group, but the advocacy of political and public causes, selected by the membership, is a not insubstantial part of what it does. Further, all of its doings are colored by the adoption and recitation at meetings of the Jaycee "Creed," quoted *ante* at 4, which espouses "faith in God" and "free enterprise" and declares that "the brotherhood of man transcends the sovereignty of nations." Most Americans may regard these sentiments as no more than pious platitudes, but they nonetheless have a distinct ideological content. Some people do not believe in God; some do not agree that "free enterprise" is the best way to win "economic justice," and some care more about "the sovereignty of nations," or a particular nation, than they do about "the brotherhood of man." Those who join the Jaycees identify themselves, emotionally and philosophically, with the beliefs expressed in this Creed. The same cannot be said of Dale Carnegie and similar self-improvement enterprises.

We conclude that a good deal of what the plaintiff does indisputably comes within the right of association, even as limited to association in pursuance of the specific ends of

speech, writing, belief, and assembly for redress of grievances. That there is a right involved, however, does not get the plaintiff all the way to the legal haven where it would be. Even First Amendment rights, the Supreme Court has often held, must yield at times to state interests, just as that "liberty" which the Due Process Clause protects is not insulated from every assault of government, but only from deprivation "without due process of law." We turn, therefore, to consideration of the degree to which the State wishes to interfere with the plaintiff's right of association, and of the nature of the State interest advanced to support the challenged interference.

C.

There are a number of ways in which government may seek to abridge the freedom of association. It may directly punish the act of membership; it may intrude upon the group's internal organization or integral activities; it may withhold a benefit or privilege from members of the association; or it may compel disclosure of the fact of membership. See Tribe, *American Constitutional Law* 703 (1977). The validity of a particular abridgement-in-fact can be determined only after a careful analysis of the extent and nature of the abridgement, the state interest asserted to justify the abridgement, the extent to which this interest will be impaired if the abridgement is set aside by the courts, and the extent to which this interest can be vindicated in less intrusive ways. All of these factors, and the balance among them, must be considered. None of them, considered in isolation, will be dispositive. As, for example, the type of abridgement grows more burdensome, the state interest may need to be relatively more compelling in order to sustain it. The inquiry is inescapably somewhat imprecise, and for that rea-

son may not be so satisfying, and will not be so logically demonstrable, as the answers to some other kinds of legal questions. But it must nevertheless be undertaken.

The abridgement at issue here is of the second type listed above. Government asserts the power to determine who shall be eligible for membership in the Jaycees. This kind of assertion of state power is not often encountered. It goes to the heart of the kind of association that plaintiff has had and desires to continue, an association for the advancement of the interests of young men. If the statute is upheld, the basic purpose of the Jaycees will change. It will become an association for the advancement of young people. Young men will no longer be its only beneficiaries. It is natural to expect that an association containing both men and women will not be so single-minded about advancing men's interests as an association of men only. Moreover, government will be deciding the membership of a group one of whose major activities is to petition the government for redress of grievances. It is true enough that the specific content of most of the resolutions adopted over the years by the Jaycees has nothing to do with sex. Men are no more likely than women, as such, to favor the United Nations or a balanced budget. But some change in the Jaycees' philosophical cast can reasonably be expected. It is not hard to imagine, for example, that if women become full-fledged members in any substantial numbers, it will not be long before efforts are made to change the Jaycee Creed. Young women may take a dim view of affirming the "brotherhood of man," or declaring how "free men" can best win economic justice. Such phrases are not trivial. The use of language betrays an attitude of mind, even if unconsciously, and that attitude is part of the belief and expression that the First Amendment

protects. An organization of young people, as opposed to young men, may be more "felicitous," more socially desirable, in the view of the State Legislature, or in the view of the judges of this Court, but it will be substantially different from the Jaycees as it now exists.

The State emphasizes, and rightly, that the Jaycees is not an intimate group. It has about 300,000 members nationwide, and there is no evidence in this record that any particular man who wanted to be a member has ever been rejected. On one occasion new members were even sought door-to-door. So far as the national By-Laws are concerned, members need only be male, between 18 and 35 years of age, and willing to pay the first year's dues (in the neighborhood of \$25). This is hardly a private club, in the customary sense of that word, and it is certainly not "exclusive." There is a sense in which the word "public" is justly used of such an organization. We have no doubt that if the Jaycees operated a swimming pool, a bar, or a restaurant, the facility would have to be open to women as well as men. See, *e.g.*, *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *United States v. Trustees of the Fraternal Order of Eagles*, 472 F. Supp. 1174 (E.D. Wis. 1979).

But more is at stake here than swimming, food, or drink. The Jaycees is a genuine membership organization, whose members govern its affairs and decide its policies, not just a vehicle for the delivery of commercial goods and services. Furthermore, the state has overstated to some extent the degree to which membership is open to young men indiscriminately. The eligibility criteria we have discussed up to now are all in the national By-Laws. Local chapters are free, to some extent, to impose other requirements, and the St. Paul chapter has done so. (No one may be a member of the

national group without being a member of a local chapter.) The St. Paul By-Laws require that applicants be of "good character and reputation." I H.E. Tr. 184.¹ No one has ever been rejected under that clause, but "[u]nder the appropriate circumstances," *ibid.*, someone could be. In addition, walk-in applicants are rare. *Id.* at 144. One important means of recruitment is individual contacts between existing members "and friends or acquaintances of theirs or people they run into." *Ibid.* Perhaps for this reason, the membership is homogeneous to a substantial degree. About 30 per cent of the members of the Minneapolis chapter are "upper management," and perhaps another 20 per cent are "middle management," although far less than half the population from which members are drawn are involved in either middle or upper corporate management. *Id.* at 148. Recruitment for membership in the Minneapolis Jaycees is not held out "to all members of the public." *Ibid.* Of the St. Paul chapter, about 60 per cent of the members are in "corporate management," *id.* at 183, and no more than five members out of about 400 work in government, although of all the communities in Minnesota, St. Paul presumably "is the most heavily populated by Government employees." *Id.* at 183-84. There is, in other words, a certain *de facto* process of selection at work here. The Jaycees is not exclusive or private, in the sense of small or intimate; but neither is it a cross-section of the community, even of the young male community.

We next examine the nature of the interference with the Jaycees' membership practices that state policy would produce. The intrusion is both direct and substantial. The State is not merely making the Jaycees' desired policy more dif-

¹ This reference is to Volume I of the Transcript of the hearing before the hearing examiner, held on April 23, 1979.

ficult, or more expensive. We have here no mere disclosure law, no simple withholding of state favor or benefits. The membership practice at issue is directly prohibited. The Jaycees' membership policy will have to be changed, if the State statute is upheld. If it is not, every person responsible, including those who aid or abet the violation, will be guilty of a misdemeanor, Minn. Stat. Ann. §363.101 (West Cum. Supp. 1983). In addition, if the Jaycees fails to comply, the Commissioner of the Department of Human Rights may apply to a state district court for an order directing compliance, Minn. Stat. Ann. §363.091 (West Cum. Supp. 1983), and violation of such a court order would presumably be punishable as a contempt. Furthermore, it is not clear that the effect of the Department of Human Rights' cease-and-desist order can be avoided simply by withdrawing from the State of Minnesota. In theory, the Jaycees can choose to leave the state; but the order may mean that they may not do so for the purpose of preserving their preferred membership policy, and there is no reason to suppose that they would ever wish to do so for any other reason.

The defendants assert that the state interest involved is "compelling" enough to override whatever right of association plaintiff possesses in its male-only membership policy. The state interest—"preventing discrimination in public accommodations on the basis of sex," *United States Jaycees v. McClure*, 534 F. Supp. 766, 771 (D. Minn. 1982)—is certainly "compelling" in the general sense of that word. To clear the channels of commerce of the irrelevancy of sex, to make sure that goods and services and advancement in the business world are available to all on an equal basis, without regard to immaterial personal characteristics—these are public purposes of the first magnitude. But whether the

asserted interest is "compelling" in a particular set of circumstances, whether the interest is "compelling" enough to override the right asserted, is a question that requires, we think, a more particularized analysis.

Here, upholding the claimed right of association would impair the asserted compelling state interest, but only to a limited extent. Places of public accommodation in the ordinary sense of business establishments at which goods and services are sold to the public would continue to be subject to the full vigor of the law. So would the Jaycees, insofar as any of their community activities, sales of goods, or employment practices are concerned. All of these activities would be free of discrimination in the future, as (so far as the record before us shows) they have been in the past. It is only the Jaycees' membership practices that would be affected if this particular application of the state public-accommodations law is prohibited. In this regard, we think it significant that the state interest being asserted is the interest in freedom from discrimination in public accommodations generally. If we were dealing with a statute that straightforwardly forbade membership discrimination in groups of more than a certain size that derived a substantial amount of support from business, or if the record showed that membership in the Jaycees was the only practicable way for a woman to advance herself in business or professional life, a different sort of weighing would have to take place, and such a statute might be upheld. But that is not this case. We know that some of the Jaycees' support comes from businesses which pay dues for their employees, but we do not know how much, either in absolute dollars or as a share of the Jaycees' total dues income. We know that membership in the Jaycees has been of some help to the com-

plaining individuals in their corporate careers, but we do not know whether similar organizational experience in other clubs or associations, open either to both sexes or to women only, has been or could be of similar or greater help to these or other women. Either a legislative or a judicial record illuminating these and similar questions of fact would have been of substantial use to the state in this case.

Other factors also dilute somewhat the force of the state's interest here. The Jaycees is the only group whose membership practices have ever been subjected to this law. Yet, there are hundreds of private (in the sense of nongovernmental) associations in this country whose membership is limited either to men or to women. See Gale, *Encyclopedia of Private Associations* (16th ed. 1981).^{*} Some of these groups seem pretty close to the Jaycees, and yet the Supreme Court of Minnesota has held that the law does not apply to one of them, the Kiwanis. Of this, more hereafter in Part III of this opinion, in which we deal with the vagueness argument. We mention the point here only because an asserted state interest that is being applied only selectively appears to that extent weaker than a state policy applied consistently and across the board.

Finally, there are other ways in which the state can express its displeasure with the Jaycees' discriminatory membership practice, ways less directly and immediately intrusive on the freedom of association than an outright prohibition enforced or enforceable by the criminal law. State officials could be instructed not to appear at any function of any discriminatory club, not to do any business with such a

^{*} A previous edition of this treatise was introduced into evidence at trial, but it was not made available to us as part of the Designated Record.

club, and to give no official recognition to it. State officials and employees, at least those above a certain level, could be instructed not to join such a club. Those who seek public office or preferment may validly be required to accept it *cum onere*, to divorce themselves from groups or activities that indulge in invidious discrimination. Any state tax concessions, *e.g.*, the deduction for charitable contributions, could be withdrawn. It could also be made unlawful (indeed, it may be already) for an employer to subsidize an employee's membership in any discriminatory club, or to give that membership any favorable weight in deciding whether to promote an employee. We cannot say that these measures, less direct than the flat prohibition before us in this case, would be just as effective in eliminating discrimination. Probably they would not be. The record simply does not answer that question. But the existence of less intrusive means for effectuating state policy, even if less than completely effective, is still a relevant factor. At some point the right of association claimed may be so strong, and the state interest asserted comparatively so weak, that the existence of somewhat less effective alternative means may be enough to tip the constitutional balance against the state.

Obviously these are questions of degree. The lines are not always clear, just as the line is not always clear between collective-bargaining activities, for which members of the bargaining unit, whether or not they are members of the union, may be compelled to contribute, "and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Abood v. Detroit Board of Education*, 431 U.S. 209, 236 (1977). The degree of constitutional protection to which certain conduct is entitled becomes progressively greater as the element of "speech" or

"expression" grows, and that of "act" or "conduct" increases. It becomes progressively less as the speech begins to appear more "commercial." Despite the imprecision of these categories, "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). In determining how the balance should be struck here, we turn to an examination of certain cases claimed by one side or the other to be persuasive.

D.

The parties refer us to various opinions of the Supreme Court that are claimed to support their positions. Plaintiff stresses the following passage from a dissenting opinion of Justice Douglas, joined by Justice Marshall, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972) (footnote omitted):

My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

It also cites the concurring opinion of Justice Goldberg, joined by Warren, C.J., and Douglas, J., in *Bell v. Maryland*, 378 U.S. 226, 286, 313 (1964):

Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

We cannot agree that these passages are of much help, despite our respect for the authors. For one thing, they appear in separate opinions, not opinions of the Court. And for another, it is not clear to us that the Jaycees is a "private club" in the sense in which that phrase is used in the opinions cited. In *Moose Lodge* the opinion of the Court described Lodge No. 107 as "a private club in the ordinary meaning of that term," 407 U.S. at 171, and noted that it had "well-defined requirements for membership." *Ibid.*⁹ The Jaycees' membership requirements may be less restrictive than those of the Moose Lodge. Our holding above that the Jaycees have a constitutionally protected right of association turns more on the presence of traditional First Amendment activity such as speech and advocacy of public causes, than on notions of privacy or intimacy.

Defendants refer us to *Norwood v. Harrison*, 413 U.S. 455, 470 (1973), where the Court said that "[i]nvidious

⁹ But cf. *Commonwealth Human Relations Comm'n v. Loyal Order of Moose*, 448 Pa. 451, 294 A.2d 594 (1972) (the Moose Lodge is a "place of public accommodation" under a Pennsylvania statute, 43 Pa. Stat. §954; dining room may not refuse a member's black guest; but discrimination as to membership itself is not forbidden, 294 A.2d at 598-599).

private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." But that phrase appears in the course of an opinion invalidating the provision by a state of textbooks to a discriminatory school. The context—affirmative aid by the state to a discriminatory activity—is quite different from the present case. The Court's holding had only the effect of withdrawing official sanction from discrimination.

Runyon v. McCrary, 427 U.S. 160 (1976), is probably stronger authority for the defendants here. That case holds that 42 U.S.C. §1981 prohibits a private school from excluding students on the basis of race. The school was commercially operated and advertised broadly for applicants without in any way implying that all races would not be equally welcome. After holding that §1981 applies to this kind of conduct, the Court went on to reject the school's claim that the statute, as so applied, violated the First Amendment right of association. The Court quoted the passage from *Norwood v. Harrison*, *supra*, which we have already described, and then added that the school had not shown that the admission of black students would in any way inhibit the teaching of any ideas or dogma. 427 U.S. at 176.

We believe *Runyon* is not in point, for several reasons. The Court was careful to state, at the outset of its opinion, that the cases before it "do not present any question of the right of a private social organization to limit its membership on racial or any other grounds." 427 U.S. at 167 (footnote omitted). The Jaycees may not be "private" or "social" in quite the sense that the *Runyon* Court used those terms,

but it comes closer to those categories than a school that holds itself out as willing to sell its services to any member of the public. Moreover, admission of a student to a school has nothing necessarily to do with the school's own internal governance. Nonpublic schools are governed by their owners or boards of trustees, not by a vote of the student body. The Jaycees, on the other hand, is governed by its members and their elected representatives, and a change in the makeup of the membership could well result in a change in the ideas or dogma that the organization propagates. Furthermore, a student at a school is a consumer of educational services. The school does not normally take positions on public issues, or have a "Creed," or ask the government, state or federal, for redress of grievances. Members of the Jaycees receive educational services, in a sense, in the form of leadership training and experience, but they do much more than that, as we have tried to illustrate earlier in this opinion. *Runyon* is not controlling, though it may help the defendants here more than it does the plaintiff.

A closer case, in some ways, is *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945). A New York statute prohibited labor organizations from denying membership to anyone on account of race, color, or creed. The Railway Mail Association, an organization of postal clerks, limited membership to males of the Caucasian or native American Indian race. The association argued that the statute violated the Fourteenth Amendment "as an interference with its right of selection to membership and abridgement of its property rights and liberty of contract." *Id.* at 93. The controversy had arisen when a branch association attempted to admit persons not of the Caucasian race. *Id.* at 93 n.10. The Supreme Court upheld the state law. It noted, among other things, "that the

terms imposed by a dominant union apply to all employees, whether union members or not." *Id.* at 94. And therein lies the crucial distinction between *Corsi* and this case. We do not for a moment doubt the validity of a law, state or federal, forbidding sex as well as race discrimination by unions. Indeed, federal law now does just that. 42 U.S.C. §2000e-2(c)(1). But unions are not the Jaycees. The consequence of being excluded from a union, for a person who must work under an agreement between the union and the employer, is much more severe than the consequence of being excluded from any other group that does not have the quasi-governmental power to affect non-members through collective bargaining.¹⁰

In short, our decision is not controlled by precedent. We must look to principle and reason. Several factors are important to our analysis. The regulation at issue here, though not overtly related to the content of what the Jaycees are saying, nevertheless has the potential of changing that content, because it purports to specify, in one respect at least,

¹⁰ We note briefly certain other cases of peripheral relevance. *National Org. for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33 (1974), *aff'd mem.*, 67 N.J. 320, 338 A.2d 198 (1974), held that Little League baseball is a "place of public accommodation" within the meaning of N.J. Stat. Ann. §10:5-12(f). No First Amendment or freedom-of-association argument was made, and the Court noted that the Little League could withdraw from New Jersey, if it wished, in order to avoid letting girls play baseball as well as boys. *B.P.O.E. Lodge No. 2043 v. Ingraham*, 297 A.2d 607 (Me. 1972), *appeal dismissed for want of a substantial federal question*, 411 U.S. 924 (1973), upheld 17 Me. Rev. Stat. Ann. §1301-A, forbidding racial discrimination by any person holding a liquor license or a license to serve food. The Maine court's opinion notes that the statute does not forbid discrimination in membership; it simply forbids the sale of liquor and food by those who do discriminate.

the identity of those who may be Jaycees, and who therefore determine the content of what Jaycees say. Speech and advocacy are not the only things Jaycees do, but they are a significant part of it. We are not in the less well protected area of commercial speech. The special tests, easier for the state to pass, that apply in that area come to bear only when speech is "related *solely* to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980) (emphasis supplied). Nor are we dealing with speech that itself proposes an illegal act, as in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rights*, 413 U.S. 376 (1973). The state wants the Jaycees' activities expanded, not forbidden. And, even though we might think that the Jaycees would survive, even be improved, if women were admitted, some scope must be given to the private choice of those who are now in the organization. The right to choose with whom one *will* associate necessarily implies, within some limits, the right also to choose with whom one *will not* associate.

The interest of the state, though compelling in the general sense, will be less seriously impaired than at first appears if this challenged interference is prevented, for reasons we have already explained. And the state has other ways, perhaps less effective, but still powerful, to vindicate its interest. Once a serious incursion on a First Amendment right of association is shown, the normal presumption of constitutional validity is reversed. The state must show that its interference with the claimed right is clearly justified. We are not persuaded that the required showing has been made here, and we therefore hold that the application of the state public-accommodations law to the Jaycees' membership

policies is, in the circumstances of this case, invalid under the First and Fourteenth Amendments.

III.

Plaintiff also claims that the statute is invalid on grounds of vagueness and overbreadth. Either of these doctrines, if applicable, would furnish an adequate and independent basis for invalidating the public-accommodations law as applied to the membership practices of nongovernmental organizations, entirely apart from the invalid-as-applied ground described in Part II of this opinion. At first glance, the statute seems anything *but* vague in the present context. Whatever might have been its initial uncertainty as to the application of the phrase "place of public accommodation," and however startled it may be at that phrase's interpretation by the Supreme Court of Minnesota, the Jaycees now knows that it is a "place of public accommodation," and it knows precisely what its legal duties are under the Department of Human Rights' cease-and-desist order, and what the penal consequences may be of violating that order. But the Minnesota Supreme Court, in the course of interpreting the key statutory phrase, has, in our view, introduced such an element of uncertainty as to make it impossible for people of common intelligence to know whether their organizations are subject to the law or not.

The Supreme Court's opinion at first seems to include any large membership organization that aggressively recruits among a broad segment of people—a definition that probably is not vague, though it might raise overbreadth problems, in the sense that some clearly protected activities (*e.g.*, political parties) may be drawn within the zone of prohibition. (We take it, for example, that a single-issue political party devoted to either the passage or the defeat of the

Equal Rights Amendment could assert a well-founded First Amendment right to limit its membership to one or the other sex.) The Supreme Court's opinion then seems to draw back from the full implications of its rationale. It explains that it is interpreting the law to apply only to "public" organizations—like the Jaycees—but not to "private" organizations—like the Kiwanis. Perhaps this passage in the opinion is evidence of the Court's solicitude for the rights of "private" groups, and of a desire to avoid an overbreadth challenge based on the theory that the law, even if valid as to the Jaycees, is invalid on its face because it applies to clearly protected private clubs. An "overbroad" law may be challenged even by a plaintiff whose speech or conduct is not constitutionally protected, if it does not clearly distinguish between speech that is protected and speech that is not. *Cf. Gooding v. Wilson*, 405 U.S. 518 (1972) (Georgia "fighting words" statute invalid because it had not been authoritatively construed not to prohibit protected speech); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 508 (1982) (White, J., concurring). The difficulty is that in attempting to limit the reach of the law to "public" groups, the state Supreme Court has left us without any discernible standard by which to distinguish "public" from "private." The opinion does not say what it is about the Kiwanis that makes it "private." it says only that the law applies to the Jaycees and not to the Kiwanis. All other groups are left to guess as to whether the law applies to them, and the Jaycees is left to guess as to how it might change itself in order to become "private."

The state answers that the Supreme Court of Minnesota did not really mean to hold that the Kiwanis is "private," and that in fact the record does not contain enough informa-

tion about the Kiwanis to determine what its status is, or how it compares with the Jaycees. We do not so read the Supreme Court's opinion. The relevant passage, 305 N.W.2d at 771, seems clearly to say that the Kiwanis Club is "private" and therefore not subject to the law. The record is hardly full as to the Kiwanis Club and its activities, but the information it does contain seems rather to emphasize the similarities between the Kiwanis and the Jaycees, than the differences. The Kiwanis Club has about 300,000 members nationwide, in about 7,750 local chapters. 1 Gale, *Encyclopedia of Private Associations*, *supra*, at 783 (16th ed. 1981). It has as broad a range of activities as the Jaycees and competes for "the same class of members," except that the Kiwanis has no upper age limit. Tr. 72.¹¹ Its membership requirements read as follows:

Section 4. *Active Membership.*

a. The active membership of this club shall consist of men of good character and community standing residing or having other community interests within the area of this club.

b. The active membership of this club shall be composed of a cross section of those who are engaged in recognized lines of business, vocation, agriculture, institutional or professional life; or who having been so engaged, shall have retired. The number of members in any one given classification shall not exceed twenty percent (20%) of the total active membership.

c. No man shall be eligible to membership in this club who holds membership (other than honorary) in

¹¹ The reference is to the transcript of the trial before the District Court on August 3, 1981.

any other Kiwanis club or service club of like character.

d. An active member shall pay a membership fee and annual membership dues, and shall be entitled to all the privileges of this club.

At the oral argument the state suggested that membership in the Kiwanis Club is less broadly available than membership in the Jaycees. The language quoted from the By-Laws of the Kiwanis Club fails to demonstrate this claim to our satisfaction. The group of men from which Kiwanians are drawn may be just as numerous as the group from which Jaycees are drawn in practice, especially since there is no upper age limit in the Kiwanis Club. Perhaps Kiwanians do not recruit so aggressively as the Jaycees. We cannot be sure on this record. But the key point is that the Supreme Court's opinion does not identify the facts that served to distinguish the Kiwanis from the Jaycees in its mind, and therefore fails to supply any criterion for distinguishing "private" from "public" groups for purposes of the statute in question. The law, as construed by the Minnesota Supreme Court, simply provides no ascertainable standard for inclusion or exclusion, *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), and is therefore void for vagueness. This conclusion is reinforced by the settled rule that the void-for-vagueness doctrine "demands a greater degree of specificity" in First Amendment cases than in other contexts. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). It is true that the Jaycees knows now that it is subject to the statute, because the highest state court has told it so. But it did not know it when the conduct now said to be illegal began, and it does not know now what it is that makes it "public," as contrasted with the "private" Kiwanis Club. A statute could

perhaps be drafted that would adequately distinguish those categories, but this statute, as interpreted, does not.¹²

IV.

We conclude that the Minnesota public-accommodations law, in the context of the membership practices of non-governmental organizations, is invalid on two alternative and independent grounds: (1) it directly interferes with the Jaycees' First Amendment right of association without sufficient justification; and (2) it is void for vagueness because it supplies no ascertainable standard for the inclusion of some groups as "public" and the exclusion of others as "private." Our holding is a narrow one. The law will continue to apply with full vigor to all business and commercial activity in the usual sense of those words—to businesses, for example, that sell goods and services to the public. It will also apply to those non-membership activities of the Jaycees and other groups that affect the public at large, including the sale of goods, the dispensing of charitable donations, the organization of sporting events, and the like. It is only the law's interference with an organization's choice of its own members that we hold invalid under the First and Fourteenth Amendments.

The judgment of the District Court is reversed, and the cause is remanded to that Court with directions to fashion injunctive relief in favor of the plaintiff consistent with this opinion.

It is so ordered.

LAY, Chief Judge, dissenting.

I respectfully dissent.

¹² In view of our holding that the law is fatally vague, we do not reach plaintiff's claim of overbreadth.

The attempt of the Jaycees to exclude women from their full membership seeks protection under what I consider to be an outdated rationale of our jurisprudence, one which relegated women to a status inferior to that of men.¹

I. *Right of Association.*

The majority decision is that the Jaycees' right of association cannot be made subordinate to the State of Minnesota's application of its civil rights act. This view I find to be totally untenable. The court acknowledges that it is within the state's prerogative to make the factual determination as to what may constitute a "place of public accommodation."² In all due respect, it seems patently clear, however, that the majority decision rests upon an implied disagreement with the finding of the Minnesota Supreme Court that the

¹ See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961) (Florida statute relieving women but not men from jury service not unconstitutional); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (Michigan statute forbidding females to act as bartenders unless the wife or daughter of male owner not violative of equal protection); *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (state statute limiting females' workday to 10 hours a day not unconstitutional); *Cronin v. Adams*, 192 U.S. 108, 114-15 (1904) (state may condition issuance of liquor license by prohibiting women from entering place where liquor is sold); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) (fourteenth amendment does not confer right to vote on women); *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 138-39 (1872) (federal constitution does not prohibit state from excluding women from the practice of law).

² As Judge Arnold says, *supra*, at 12:

We of course take as a given that the Jaycees is a "place of public accommodation" within the meaning of the Minnesota statute. The Supreme Court of Minnesota has answered that question, and it has the last word. Its "construction fixes the meaning of the statute [and] . . . puts . . . words in the statute as definitely as if it had been so amended by the legislature." *Winters v. New York*, 333 U.S. 507, 514 (1948).

Jaycees is a statutory "place of public accommodation."³ The majority's analysis is otherwise without much force.

It is true that "mere labels" cannot be used as subterfuge to undermine the proper exercise of constitutional rights. However, there should be little question that a state, as well as the federal government, may provide reasonable restrictions on the exercise of constitutional rights in a "place of public accommodation." *See, e.g.*, 42 U.S.C. §2000a (1976). "Even a 'significant interference' with protected rights of . . . association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). The validity of substantial burdens on the right to associate is upheld when "they are necessary to further compelling state interests" and are "reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." *American Party v. White*, 415 U.S. 767, 780-81 (1974).

The majority rests its decision on a balancing approach in which the state allegedly has failed to show that its interference with the Jaycees' right to associate is justified. I have great difficulty with the court's reasoning for several reasons.

First and foremost, the majority's conception of the Jaycees is based upon factual error. The majority asserts,

³ This is made clear, for example, when the majority says: "The Jaycees may not be 'private' or 'social' in quite the sense that the *Runyon* Court used those terms ['private social organization'], but it comes closer to those categories than a school that holds itself out as willing to sell its services to any member of the public." *Supra*, at 30.

supra, at 21-22, that a prohibition of the Jaycees' sexually discriminatory membership practices

goes to the heart of the kind of association that plaintiff has had and desires to continue, an association for the advancement of the interests of young men. . . . It is natural to expect that an association containing both men and women will not be so single-minded about advancing men's interests as an association of men only. . . . An organization of young people, as opposed to young men . . . will be substantially different from the Jaycees as it now exists.

Overlooked in recitation, however, is the fact that the Jaycees is not now an association containing only men. It freely admits women, but relegates them to inferior positions within the organization. Women who buy memberships participate in programs with the male members, but unlike men, they are not allowed to vote, hold office, or receive awards. *United States Jaycees v. McClure*, 305 N.W.2d 764, 765 (Minn. 1981).

Moreover, the interests the Jaycees advance are not solely "young men's interests." A glance at the social, civic, and ideological activities of the Jaycees discussed in the majority opinion, *supra*, at 18-20, immediately discloses interests equally applicable to any state citizen, not just young men. The Jaycees operate on the arbitrary sentiment that men have a natural monopoly on such advocacies; this only serves to perpetuate the chauvinistic myth that women are incapable of dealing with such matters.

The majority proclaims that its holding "turns more on the presence of traditional First Amendment activity such as speech and advocacy of public causes, than on notions of privacy or intimacy." *Supra*, at 29. On this basis, the right

of association pertaining to this "place of public accommodation" is elevated to override concededly compelling state interests.⁴ Such bootstrapping lacks all potency, however, when the restriction the state seeks to apply does not create any threat to the exercise of the Jaycees' speech and advocacy of public causes. The activities the Jaycees engage in have no relationship to its internal membership practices; an association of men with privileges superior to women does not enhance the effectiveness of the type of advocacy the group has undertaken. See *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Thus, application of the statute to the Jaycees would not curtail or intimidate any advocacy the association has pursued. See *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Buckley v. Valeo*, 424 U.S. at 28-29; *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123, 129 (S.D.N.Y. 1977).

The majority does admit that "[m]en are no more likely than women" to favor certain political issues, but then proceeds to apparently ground its holding on a potential "change in the Jaycees' philosophical cast" since "[y]oung women may take a dim view of affirming the 'brotherhood of man'" or other such expressions contained in the Jaycees' creed. *Supra*, at 22. Such a prediction, however, is unsupported by any factual basis. Many men as well as women believe women should be treated equally in accordance with

⁴ The majority also contends that it is unclear whether the Jaycees can avoid the effect of the Department of Human Rights' cease-and-desist order simply by withdrawing from the state. *Supra*, at 24. I agree with the district court, however, 534 F. Supp. at 772, that the order must be construed according to its intent which was to require the Jaycees to do business in Minnesota in compliance with Minnesota law, if at all.

men.⁵ On the other hand, many women oppose certain advances in women's rights.⁶ The speculative supposition that the Jaycees' creed "may" change if women are granted equal privileges is a manifestly inadequate basis upon which to deprive the state from enforcing its overpowering interest within this sphere of public accommodations. See *Buckley v. Valeo*, 424 U.S. at 20-23, 25-29; *American Party v. White*, 415 U.S. at 790 (state regulation valid; "absolutely no factual basis" presented in support of claim of undue burden on first amendment rights regulation); *Konigsberg v. State Bar*, 366 U.S. 36, 51-53 (1961); *American Communications Assn. v. Douds*, 339 U.S. 382, 396, 402-04, 406 (1950); *Railway Mail Association v. Corsi*, 326 U.S. 88, 93-94 (1945).

Furthermore, there is no claim or evidence, beyond the disputed membership practices, that any belief expressed in the Jaycees' creed is carried over into affirmative doctrinal advocacy that would be restrained by application of the state statute. The *belief* and the *advocacy* of the "brotherhood of man" and other male-oriented credos, even if intended to connote believed deficiencies of the female gender, would, if threatened, receive robust protection under the first amendment. However, the *conduct* or *practice* of discriminatory treatment in a "place of public accommodation" on the basis of illegal criteria cannot be safeguarded under an asserted constitutional right of association that has, at best, a hypothesized nexus to any deterrence of other protected first amendment rights. See *Runyon v. McCrary*, 427

⁵ For example, many Jaycees' chapters, including the Minneapolis and St. Paul chapters, presumably with large male constituencies, have flouted the national organization's practices which are sexually discriminatory.

⁶ This posture is illustrated by the nation's struggles with the Equal Rights Amendment to the United States Constitution.

U.S. at 176; *Railway Mail Association v. Corsi*, 326 U.S. at 93-94; cf. *Norwood v. Harrison*, 413 U.S. 455, 470 n.10 (1973) (Court noted federal law barring discrimination in public accommodations, 42 U.S.C. § 2000a (1976)).

There should be little doubt that a sovereign has a compelling interest in eradicating second-class citizenship in places of public accommodation. The State of Minnesota has decreed that it is an unfair discriminatory practice "[t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sex." Minn. Stat. § 363.03(3) (Supp. 1982). The majority's constitutional argument would make sense if the Jaycees were a private membership organization possessing private associational characteristics. However, it has already been determined otherwise; the Jaycees is a "business . . . facility . . . whose goods, . . . privileges [and] advantages . . . are . . . sold, or otherwise made available to the public." 305 N.W.2d at 766-74; see Minn. Stat. § 363.01(18) (Supp. 1982) (statutory definition of "place of public accommodation"). The legislative history and the evidence in the record clearly supports the legal and factual findings reached by the Minnesota court as to the Jaycees.⁷

⁷ The Supreme Court of Minnesota resolved that the Jaycees is a *business* because its members are treated as customers; the product sold is membership in a leadership-training organization. 305 N.W.2d at 768-69. The court found that the Jaycees is a *public*, not private, business because the organization is unselective in those to whom it sells memberships, rewards vigorous recruitment, and strives for unlimited growth. *Id.* at 769-71. The court furthermore decided that both the fixed site of the Jaycees' state headquarters and the mobile sites, including door-to-door solicitation of new members, constitutes public business *facilities* where an un-screened, unselected, and unlimited number of persons are invited. *Id.* at 771-74.

In any event, the court's determination of facts and state law are binding upon us in our task to determine the constitutionality of applying this state law to the Jaycees. See *NAACP v. Button*, 371 U.S. 415, 431-32 (1963); *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 499-500 (1941).

II. Vagueness.

The majority concludes that the Minnesota Supreme Court has provided no discernible standard for distinguishing "public" from "private" organizations. This conclusion does not rest on the stipulated definition by the Minnesota Supreme Court of a "public" membership organization, which the majority concedes "probably is not vague," *supra*, at 33-34, but on the unexplained comment in the state court opinion, 305 N.W.2d at 771, that the Jaycees could not "be viewed analogously to private organizations such as the Kiwanis International Organization."

The state determination that the Kiwanis is a "private" association is readily explainable, however, on the basis of the Kiwanis' membership requirements reported in the record and quoted in the majority opinion here. See *supra*, at 35. The Minnesota court denotes as one criterion for the public-private distinction the use of standards in selecting new members and a formal procedure by which membership is restricted. The membership of the Kiwanis group is limited so that the number of members in any one given occupational classification cannot exceed 20% of the total active membership. Such a restriction circumscribes membership boundaries and would serve in itself to make the Kiwanis "private," unlike the Jaycees which has no limiting requirements except for age and sex.

The failure of the Minnesota court to identify specifically this difference between the Kiwanis and the Jaycees which is

apparent in the record cannot justify invalidating the state statute as applied to membership organizations. A developed body of federal and state case law exists which analyzes various characteristics as public or private within the context of public accommodations statutes; the Minnesota court adopted these accepted standards from other courts for the criteria it employed to determine that the Jaycees' memberships are, in statutory terms, "made available to the public." See 305 N.W. 2d at 770. Long usage as well as common understanding provides well-defined contours to the public-private distinction the Minnesota court utilized. See *Grayned v. City of Rockford*, 408 U.S. 104, 110-12 (1972); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 159 (1971); cf. *NAACP v. Button*, 371 U.S. at 434 (state statute as construed by state court is invalid; statutory definition appeared to depart from common-law concept and state court did not clarify). If a statute can be made constitutionally definite by a reasonable construction, we have a duty to give the statute that construction, *United States v. Harriss*, 347 U.S. 612, 618 (1954); this same requirement should be equally applicable to the words of a state supreme court construing a state statute.⁸ See *Winters v. New York*, 333 U.S. 507, 514 (1948). "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. at 110. See *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973).

⁸ As in *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973), it is significant that the state legislature has mandated the creation of advisory committees to disseminate technical assistance to interested persons. See Minn. Stat. § 363.05(17), (20), (21) (Supp. 1982). To remove doubts as to the meaning of the law insofar as the state commission is concerned, advice can be sought on the validity of proposed courses of conduct.

Moreover, even if the outermost boundaries of the public-private distinction is assumed to be imprecise, under accepted principles of constitutional adjudication, the Jaycees, who clearly fit within the definition of a "place of public accommodation," has no standing to challenge the vagueness of this statute as construed and applied to hypothetical organizations not before us. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *Parker v. Levy*, 417 U.S. 733, 756 (1974).

III. Overbreadth.

The majority does not reach the overbreadth issue, but nevertheless insinuates invalidity on this basis of the state statute as construed. As an example that some protected activities may be prohibited, the majority alludes to the right of a single-issue political party, devoted to the passage or defeat of the Equal Rights Amendment, to limit its membership to one gender. *Supra*, at 34. I fail to see how such an illustration is applicable to a statute aimed at "place[s] of public accommodation." Although a political party of this sort may be determined to be "public" under the selectivity and size criteria employed by the Minnesota court, such an association would not fit other requirements of a "place of public accommodation." The hypothetical political party would not be a business offering or selling goods, services, privileges, or advantages, nor could its characteristics possibly be harmonized with other categories within the Minnesota public accommodations law.

Because a statute declared to be overbroad cannot be enforced until narrowed, application of the doctrine is "strong medicine" and is to be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. at 613. "[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial

as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. The potential effect of this statute on protected associational choices is mere speculation. *See id.*; *Ohrlik v. Ohio State Bar Association*, 436 U.S. 447, 462 n.20 (1978). In such a situation, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. at 615-16.

In conclusion, I find the state statute as construed can be constitutionally applied to the discriminatory membership practices of the United States Jaycees, and is neither vague nor overbroad. I would affirm the decision of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-79-530

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of
its qualified members,

Plaintiff,

vs.

MARILYN E. McCLURE, Commissioner,
Minnesota Department of Human Rights,
WARREN SPANNAUS, Attorney
General of the State of Minnesota,
and GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Defendants.

MEMORANDUM OPINION
AND ORDER FOR JUDGMENT

CLAY R. MOORE, Esq., Mackall, Crounse & Moore, and
CARL D. HALL, JR., Esq., Oral Roberts University Law
School, appeared on behalf of plaintiff.

RICHARD L. VARCO, JR., Esq., Special Assistant General
for the State of Minnesota, appeared on behalf of defen-
dants.

Plaintiff United States Jaycees (the Jaycees) brought this
action against defendants Marilyn E. McClure, Commis-
sioner of the Minnesota Department of Human Rights (the

Department), Warren Spannaus, Attorney General for the State of Minnesota, and George A. Beck, Hearing Examiner for the State of Minnesota, pursuant to 42 U.S.C. § 1983, seeking a judgment declaring Minn. Stat. §§ 363.01(18), and 363.03(3), (6), and (7) unconstitutional and enjoining enforcement thereof, as well as "such costs, attorneys fees and damages as may be proven and allowable." Jurisdiction is alleged under 28 U.S.C. §§ 1331, 1332, and 1343.

Trial was had on August 3, 1981; counsel were given leave to file post trial briefs, and final arguments were heard on January 27, 1982, when the matter was taken under advisement. Based upon the evidence adduced at trial, and all the files, records, and proceedings herein, the court now makes the following findings of fact and conclusions of law in memorandum form.

Procedural Background

This case arose from complaints brought by individual members of the Jaycees. On December 14, 1978, four members of the St. Paul chapter of the Jaycees, including its president, filed a charge of discrimination with the Department, based on the Jaycees' policy of forbidding women the same membership status in the Jaycees as men. On December 19, 1978, four members of the Minneapolis chapter of the Jaycees, including its president, filed a similar charge. The Department investigated and found probable cause to believe the Jaycees had violated Minn. Stat. §§ 363.03(3), (6), and (7)¹ and served notice of the finding and an order for a

¹ § 363.03(3) provides in relevant part:

It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sex . . .

hearing. The Department's attempts to conciliate the matter failed.

The Jaycees filed an action in this court on February 27, 1979, seeking the same relief it now requests but asking the court to abstain from a determination of the merits of the constitutional claims until the conclusion of administrative proceedings before the Department. The district court² dismissed the action without prejudice to renewing the action if the Jaycees received an adverse determination in the state administrative proceeding.

After a hearing, the State Hearing Examiner,³ issued findings and conclusions which stated that the Jaycees is a place of public accommodation as defined by Minn. Stat. § 363.01(18),⁴ and that by subjecting its Minneapolis and St. Paul chapters to sanctions and warning them of an intended vote on revocation of their charters because of their admission of women as individual or regular members, it committed an unfair discriminatory practice in violation of Minn. Stat. § 363.03(3). The hearing examiner, pursuant to

§ 363.03(6) forbids intentionally aiding, abetting, or coercing another to engage in any of the practices forbidden by the Human Rights Act.

§ 363.03(7) forbids reprisals for opposing or filing a charge concerning any practices forbidden by the Act.

² The Honorable Miles W. Lord presiding.

³ Defendant George A. Beck.

⁴ § 363.01(18) provides:

"Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

Minn. Stat. § 363.071(2),⁵ issued a cease and desist order enjoining the Jaycees from 1) revoking the charter of, denying the privilege or right of membership to, or otherwise discriminating against any local chapter or state organization of the Jaycees within Minnesota for extending to women all the rights and privileges of individual or regular membership, or 2) discriminating on the basis of sex against any member or applicant for membership in a Jaycees local chapter within Minnesota with respect to the terms, conditions, or privileges of membership in the local chapter, state organization, or the Jaycees.

The Jaycees then filed the present action. At the request of the parties this court certified the following question to the Minnesota Supreme Court pursuant to Minn. Stat. § 408.061 (3):

Is The United States Jaycees a "place of public accommodation" within the meaning of Minn. Stat. § 363.01 Subdivision 18?

By stipulation, the parties agreed that the evidentiary facts relevant to the certified question were those contained in the findings of fact of the hearing examiner and the transcript and exhibits in the record of the state administrative proceeding. The supreme court answered the question in the affirmative. *United States Jaycees v. McClure*, 305 N.W. 2d 764, 765 (Minn. 1981).

⁵ § 363.071(2) provides in relevant part that

if the hearing examiner finds that the respondent has engaged in an unfair discriminatory practice, the hearing examiner shall issue an order directing the respondent to cease and desist from the unfair discriminatory practice found to exist and to take such affirmative action as in the judgment of the examiner will effectuate the purposes of this chapter . . .

The Minnesota Supreme Court reviewed the legislative history of Minn. Stat. §§ 363.01 and 363.03, as well as the characteristics and practices of the Jaycees. The court concluded that the Jaycees is a place of public accommodation as defined by the legislature in § 363.01(18) because: 1) the Jaycees is a "business" in that it sells goods and extends privileges in exchange for annual membership dues; 2) it is a "public" business in that it solicits and recruits dues paying members but is unselective in admitting them, and 3) it is a public business "facility" in that it continuously recruits and sells memberships at sites within the State of Minnesota. *Id.* at 768.

Issues presented

The Jaycees contends that the actions of the State of Minnesota and the Minnesota Supreme Court deprive it and its members of the right of freedom of association guaranteed by the First and Fourteenth Amendments of the United States Constitution and that the Minnesota statutes, as applied, are unconstitutionally vague and overbroad.⁶

Facts

The factual record before this court is essentially the same as that before the Minnesota Supreme Court although additional evidence was introduced here. The record consists of the hearing examiner's findings and conclusions, the transcript and record of the state proceedings, the testimony of Arthur W. Boutiette, Executive Vice President of the Jaycees and the organization's historian, exhibits offered during his direct examination, and certain additional exhibits. Having carefully reviewed the record, the court

⁶ In its complaint the Jaycees also alleged a violation of the Equal Protection Clause, but it has chosen not to pursue that claim.

adopts the factual statements of the Minnesota Supreme Court as augmented by its own findings.

The Jaycees is a non-profit corporation, exempt from federal income taxes. It has received no federal funds since 1977 and has never received state funds. There are 51 state organizations affiliated with the Jaycees and approximately 8,800 local Jaycee chapters. Membership in a local chapter automatically enrolls the member in the state and national chapter.

The Jaycees considers itself to be a young men's leadership training organization, serving the goals of individual development, community development, and development of management ability.⁷ It claims that the training it offers gives members an advantage in business and civic advancement, and businesses are in fact sometimes requested to pay the dues for individual members. The Jaycees provides its local chapters with programs and materials relative to its stated goals. These include, for example, a personal dynamics program, a public speaking program, Junior Athletic Championships, leadership dynamics materials, and the like. In addition, the Jaycees from time to time issues various policy statements on political and social issues after taking votes of its members either by national referendum or through votes of delegates at national conventions.

One of the major activities of the Jaycees is the sale of memberships in the organization. It encourages continuous

⁷ The Jaycees bylaws state that it is organized to promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement . . .

recruitment of members with the expressed goal of increasing membership and offers no selection criteria for members, save age and sex. It was primarily on the basis of the manner of the Jaycees sale of memberships that the Minnesota Supreme Court concluded it was a public accommodation as defined in Minn. Stat. § 363.01(18). The Jaycees itself refers to its members as customers and membership as a product it is selling. More than 80 percent of the national officers' time is dedicated to recruitment, and more than half of the available achievement awards are in part conditioned on achievement in recruitment. The Jaycees discourages selective recruitment of members, preferring a high quantity of new recruits. The Executive Director for the affiliated organization of Minnesota has stated that he had no knowledge of a rejection of any application for membership.

The Jaycees has a policy which admits women to membership but does not afford them the same privileges enjoyed by male members. Men, ages 18 to 35, may become individual members, whereas women may be offered only associate memberships. Annual membership dues are only slightly less for associate membership. Associate members are not allowed to stand or be nominated for office, vote in the election of officers, vote in matters of decision in the local, state, or national organizations, or receive achievement awards. They are allowed, however, to participate in and contribute to the success of the programs upon which such awards are based. Men can continue to receive awards after age 35, even though they may then purchase only associate memberships.

The Minneapolis and St. Paul chapters of the Jaycees have disagreed with this policy. In 1974 and 1975 they be-

gan to allow women to purchase individual memberships and accorded them the same privileges as male members. On the national level, the Jaycees voted down an amendment to its bylaws that would allow women to buy individual memberships, but set up a "pilot membership program" which allowed local chapters in five states to offer individual memberships to women. In June of 1978, the Jaycees ordered the pilot membership program terminated and again rejected a change in policy to allow women the same membership status as men. Then in 1981, Jaycees members voted in a national referendum not to change the membership status of women, 67 percent voting against the change and 33 percent for.

From 1975 to June of 1978, the Minneapolis chapter was subjected to sanctions for violation of the Jaycees bylaws restricting individual memberships to men. The sanctions included exclusion of the chapter members' votes when computing votes at the national level, disallowing the chapter members from running for state or national office, and declaring the chapter ineligible to host national events.

On December 15, 1978, the Jaycees advised the Minneapolis and St. Paul chapters it planned to vote on whether to revoke their charters because they had violated the bylaws by continuing to afford women equal privileges with men. This occurred on the day after members of the St. Paul chapter filed their complaints with the Department.

Discussion

The parties recognize that the Minnesota Supreme Court's interpretation of Minn. Stat. § 363.01(18) represents an authoritative construction of that section and is binding on this court. *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963). The only question before this court therefore is whether

the application of the statute to the Jaycees violates its constitutional rights.

1. *Freedom of association*

The Jaycees claims that the application of the Minnesota Human Rights Act to it deprives it of the right to "associate for the purpose of advancing only the interests of young men." This deprivation is alleged to have taken place absent any compelling state interest.

The only First Amendment interest articulated by the Jaycees is freedom of association. It is questionable whether association not directed at the exercise of other First Amendment rights enjoys constitutional protection. See L. Tribe, *American Constitutional Law*, at 702 (1976). Supreme Court cases upholding a right of freedom of association have involved association in connection with other protected First Amendment activities. See, e.g., *Widmar v. Vincent*, 102 S.Ct. 269, 276 (1981); *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462 (1958). Certain language in decisions of this circuit, however, suggests that freedom of association itself may be a "basic constitutional freedom." *Norbeck v. Davenport Community School District*, 545 F.2d 63, 67 (8th Cir. 1976). See *Greminger v. Seaborn*, 584 F.2d 275, 278 (8th Cir. 1978); *American Federation of State, County and Municipal Employees v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) ("The First Amendment protects the right of one citizen to associate with other citizens for any lawful purpose free from government interference."). The Fifth Circuit has held the right of social association itself to be constitutionally protected. See *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1041-1042 (5th Cir. 1980), *rev'd on other grounds*, 50 U.S.L.W. 4210 (1982).

The court need not, however, reach the issue of whether association is itself protected by the First and Fourteenth Amendments. Application of other constitutional principles shows that if there is such a right, it has not been unconstitutionally denied to the Jaycees.

The Jaycees is not afforded affirmative constitutional protection for its practice of distinguishing the rights and privileges of men and women members. "Invidious private discrimination may be characterized as a form of exercising freedom of association . . . but it has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). While the Jaycees has a right to believe that its organization should only advance the interests of men, its practice of excluding women from equal benefits does not enjoy protection under the circumstances presented. See *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

Even assuming the Jaycees' membership policy constituted an exercise of a protected right to associational freedom, the state has shown a sufficiently compelling interest to overcome such a right. The right to associate is not absolute; even a significant interference with the right of association may be sustained if the state demonstrates a sufficiently important interest and avoids unnecessary abridgment of First Amendment rights. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

Minnesota has demonstrated its commitment to prohibiting discrimination in access to public accommodations on the basis of sex. Its legislature has clearly stated that "it is the public policy of this state to secure for persons in this state, freedom from discrimination . . . in public accommodation because of . . . sex . . ." Minn. Stat. § 363.12. The vehicle it has chosen to accomplish this purpose is the Minnesota

Human Rights Act, including the provisions at issue in this case.

The legislative history of the act shows the legislative intent and policy behind its prohibitions. That history was set forth in the Minnesota Supreme Court's opinion answering this court's certified question and was the foundation for its analysis. Minnesota has had a law barring racial discrimination in accommodations since 1885, and its coverage has been expanded from time to time since then. Discrimination in public accommodations on the basis of religion and national origin was prohibited in 1943, and on the basis of sex in 1973. The definition of public accommodations has been enlarged and simplified, and ultimately in 1967 came to be focused on a business facility of any kind and "conduct in which discrimination would be prohibited" (*United States Jaycees v. McClure*, 305 N.W.2d at 768) rather than on a particular site.^{*} The legislature itself declared that the statute should be construed liberally to accomplish its purpose (Minn. Stat. § 363.11) which is to protect the citizens of Minnesota from discrimination (§ 363.12). On this background the court concluded that the legislature had shown "its own special and unusually broad definition of the term 'public accommodation.'" 305 N.W.2d at 766.

Minnesota's interest in preventing discrimination in public accommodations on the basis of sex is compelling. Sex discrimination has been prohibited in some cases by the courts, *see e.g., Frontiero v. Richardson*, 411 U.S. 677, 688

^{*} Minnesota's statutory definition of public accommodation is significantly different than that of the District of Columbia, making *United States Jaycees v. Bloomfield*, Case No. 79-1141 (D.C. Aug. 31, 1981), of little or no value in deciding the issues before this court.

(1973), and by the United States Congress, *see e.g.*, 42 U.S.C. § 2000e-2 (forbidding discrimination in employment on the basis of sex). Such statutory provisions do not run afoul of the First Amendment. *See Norwood v. Harrison*, 413 U.S. 455, 470 (1973). Similarly, Minnesota's decision to forbid sex discrimination in public accommodations by use of a carefully drawn statute does not violate the First Amendment. The statute's focus on commercial activity, which occupies "a subordinate position on the scale of First Amendment values . . ." (*Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978)), further supports this conclusion.

It is the policy of the State of Minnesota set by its elected representatives in its civil rights statute to prohibit sex discrimination to the same extent as racial discrimination. The Minnesota Supreme Court commented that if the Jaycees were discriminating on the basis of race, it would have no difficulty in holding that such action was barred by the statute, and the fact that the discrimination is on the basis of sex should not lead to a different result. 305 N.W.2d at 774. Protection of citizens from discrimination on the basis of sex is a legitimate interest of the State of Minnesota which it has chosen to value highly. Its statutory scheme does no more than require that those organizations which are by their nature public accommodations and which choose to do business in Minnesota offer such accommodations on a nondiscriminatory basis.

Contrary to the Jaycees' contention that its purpose would be destroyed by allowing women full membership, the hearing examiner's order does not require the Jaycees to abandon its purpose of providing leadership training, self improvement, and community involvement to young men.

There is no reason to believe that opportunities for young men would be restricted or that male members would not be able to take full advantage of activities and programs offered by the Jaycees if women become full members. *Cf. Lucido v. Cravath, Swaine, & Moore*, 425 F.Supp. 123, 129 (S.D.N.Y. 1977) (Application of Title VII to law firm's partnership promotion practices held not to interfere with First Amendment rights.).

The Jaycees argues that Minnesota and its Supreme Court are in conflict with the holding of the Eighth Circuit Court of Appeals in *Junior Chamber of Commerce of Kansas City v. Missouri Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975). That case is not controlling here, however. It held that the Jaycees' receipt of government funds did not convert its private action into state action, thereby triggering the due process guarantees of the Fifth Amendment. *Id.* at 1033-1034. The doctrine of state action is not at issue here. The Minnesota court found that because of its special characteristics the Jaycees is a public accommodation within the meaning of the Minnesota civil rights statute. The absence of state action does not preclude an entity's being a public accommodation. There is no doubt that an organization may be regulated by government even if it receives no governmental funding, and such an organization can also be a public accommodation for constitutional purposes if it offers services and facilities to the public. *See e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The Jaycees also argues that the hearing examiner's cease and desist order prohibiting revocation of the charter of any local or state organization which extends equal membership privileges to women erodes its right to freedom

of association because it requires it to continue to offer services in Minnesota despite what it perceives to be an adverse legal climate. This argument misconstrues the nature of the hearing examiner's order. The purpose of the order was to require the Jaycees to do business in Minnesota in compliance with Minnesota law, if at all. It was obviously not the intent of the hearing examiner to require the Jaycees to continue to sell memberships in Minnesota in perpetuity, but instead to keep it from retaliating against local chapters which choose to obey Minnesota's proscription against sex discrimination in public accommodations.

2. *Vagueness and Overbreadth*

The Jaycees contends that Minn. Stat. §§ 363.03(3) and 363.01(18) as construed by the Minnesota Supreme Court are unconstitutionally vague and overbroad.

An enactment is void for vagueness if its prohibitions are not clearly defined, or if it does not give a person of ordinary intelligence reason to know what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The exact application of this due process principle may vary depending on whether the enactment is criminal, penal regulation of business, of civil. Compare *Papchristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) with *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963) and *Horn v. Burns and Roe*, 536 F.2d 251, 256 (8th Cir. 1976).

Even if the strict standard normally applied in criminal cases is used, the portions of the statute to which the Jaycees objects are not unconstitutionally vague. The term "place of public accommodation" when construed with normal aids to statutory construction can be understood by those of common understanding to apply to the Jaycees. See generally *Ross*

v. Locke, 423 U.S. 48, 50 (1975). Both the Minnesota Legislature and the Minnesota Supreme Court have noted that the provisions of the Minnesota Human Rights Act are to be construed liberally to effect its purposes. Minn. Stat. § 363.11; *State v. Bergeron*, 290 Minn. 351, 357, 187 N.W. 2d 680, 683-684 (1971). The findings of the Minnesota Supreme Court clearly illustrate the applicability of the statute to the Jaycees, based on facts concerning its recruitment policy and sales of memberships, all of which were well known to the Jaycees. See *United States Jaycees v. McClure*, 305 N.W.2d at 768-774.

The Jaycees attempt to attack the statute as applied for vagueness on the ground that other organizations will be unable to ascertain whether or not they fall within the definition of "place of public accommodation" must be rejected. The Jaycees has no standing to challenge the alleged vagueness of the statute on the basis of its hypothetical application to other groups. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 58-59 (1976); *Parker v. Levy*, 417 U.S. 733, 756 (1973); L. Tribe, *American Constitutional Law*, at 720 (1976). Moreover, the Minnesota court in its lengthy discussion of the Jaycees and the statute made it amply clear that the statute only applies to a public business facility. A person of ordinary intelligence can understand what is prohibited by the statute as construed.

A statute which is sufficiently clear to survive an attack on the grounds of vagueness may still be invalid on the basis of overbreadth. The crucial question is whether the provision "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned v. City of Rockford*, 408 U.S. at 115; accord *N.A.A.C.P. v. Button*, 371 U.S. 415 433 (1963). An over-

breadth challenge does not have the same standing requirement as vagueness; a litigant may raise overbreadth concerns on behalf of others not before the court on the grounds that the challenged statute may cause them "to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). However, overbreadth applies weakly, if at all, in the ordinary commercial context. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462 n.20 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). A limiting construction of a statute may narrow it so as to remove any threat to constitutionally protected activity. *Young v. American Mini Theatres, Inc.*, 427 U.S. at 60; *Broadrick v. Oklahoma*, 413 U.S. at 613.

The statutory provisions at issue are not overbroad, particularly in light of the limiting construction by the Minnesota Supreme Court under which the statute is only applicable to public business facilities which practice sex discrimination. The court explicitly noted that its decision would not affect private associations and memberships, including those which have more selective membership criteria than the Jaycees. *United States Jaycees v. McClure*, 305 N.W. 2d at 771.

The Jaycees argues at length that the Minnesota court's interpretation of the statute makes it applicable to a number of organizations including the Boy Scouts, the Kiwanis, the Sweet Adelines, and the like. There is insufficient evidence in the record pertaining to the activities of these groups to allow any determination whether the statute would apply to them and whether the groups engage in protected First Amendment activity. The record as to the Jaycees is, however, well developed. Speculation by the Jaycees as to the

future application of the statutes to other organizations does not provide a sufficient basis to undermine their constitutionality.

It is noteworthy that the Minnesota Human Rights Act was only applied against the Jaycees after complaints were brought by some of its own members in Minnesota who believed their rights were being violated by the Jaycees and sought the protection afforded by the statute.

The evidence supports the conclusion drawn by the Minnesota Supreme Court that the Jaycees is "engaged in the business of seeking to advance its members and to add to their ranks by assiduously selling memberships in this state" (305 N.W.2d at 774) on a non-selective basis.

In sum, Minnesota's interest in prohibiting public business facilities from sex discrimination outweighs any protected right of freedom of association the Jaycees may have, and the statute as construed is neither vague nor overbroad. This case must be decided on the basis of the specific statute before the court. Application of that statute against the Jaycees does not violate the Constitution. The statute is not unconstitutional, and judgment shall therefore be entered for defendants.

ORDER FOR JUDGMENT

Based upon the foregoing,

IT IS HEREBY ORDERED THAT:

1. Judgment herein be entered for defendants and against plaintiff.
2. The parties are to bear their own costs.

Dated: March 25, 1982.

DIANA E. MURPHY
U.S. District Judge

UNITED STATES DISTRICT COURT
Cal. 388

THE UNITED STATES JAYCEES,
Appellants,

vs.

MARILYN E. McCLURE, WARREN SPANNAUS,
and GEORGE A. BECK,
Respondents.

Otis, J. Dissenting, Sheran, C.J., Peterson, J., Todd, J.

Endorsed

Filed May 8, 1981

John McCarthy, Clerk

Minnesota Supreme Court

SYLLABUS

Certified question from the United States District Court for the District of Minnesota: "Is the United States Jaycees 'a place of public accommodation' within the meaning of Minn. Stat. § 363.01, Subdivision 18?" Answer, affirmative.

Heard, considered, and decided by the court en banc.

OPINION

OTIS, Justice.

The United States District Court for the District of Minnesota has certified the following question to this court, in conformity with Minn. Stat. § 480.061(3) (1980): "Is the United States Jaycees 'a place of public accommodation' within the meaning of Minn. Stat. § 363.01 Subdivision 18?" We answer in the affirmative.

The case and question arise from a dispute between a national organization and two of its local affiliates. Their dispute concerns an admittedly unequal granting of the

privileges of membership. The national organization has settled on a policy that admits women to membership, but with the proviso that women shall not be accorded privileges that are full and equal to those accorded to men. The policy is effected by a distinction in the kinds of membership offered. Individual membership is offered to men, ages 18 to 35, in exchange for annual membership dues. Associate individual membership [hereafter "associate membership"] is offered to a business concern, association, group or individual not qualified by the by-laws to be an individual member. The annual dues charge is a few dollars less than the charge for an individual membership. Women, by definition, may be offered only associate membership.

The difference in the dues charged for those memberships is small; the difference in the privileges accorded is considerable. Associate members are not allowed to stand or be nominated for office; they are not allowed to vote in such elections, nor vote on any other matters of decision in the local, state, or national organizations; and, though women are allowed to participate in many of the programs of the organization and contribute their time and effort toward making those programs successful, women are not allowed to be the recipients of any of the numerous achievement awards given by the local, state and national organizations. The awards and the prestige are restricted to men. Men continue to receive awards even when, after age 35, they can only purchase the otherwise same associate membership as women.

This membership policy has not met with the approval of the organization's Minneapolis and St. Paul chapters. In 1974, the Minneapolis chapter began to allow women to purchase individual memberships, and accorded them privileges that were full and equal to those accorded to men. In 1975,

the St. Paul chapter made the same changes. The national organization, however, voted down an amendment to its by-laws that would have allowed individual memberships to be sold to women. The organization decided, instead, to set up a "pilot membership program". Local chapters in five states could let women purchase individual memberships. Only three of the affiliated state organizations voted to let their local chapters try the pilot program. The affiliated state organization in Minnesota voted not to try it. In June 1978, the president of the national organization ordered the pilot programs terminated. The national organization repeated its rejection of the proposed change in its policy of letting women purchase only an associate membership, costing a few dollars less but worth much less than the individual memberships that men could buy.

By letter, the national organization advised the Minneapolis and St. Paul chapters of its imminent plans to vote on whether to revoke their respective charters because those Minnesota chapters had violated the organization's by-laws by continuing to let women purchase individual memberships. On the previous day, December 14, 1978, the Minneapolis and St. Paul chapters brought before the Minnesota Department of Human Rights a charge of sexual discrimination against the national organization. They alleged violations of Minn. Stat. § 363.03(3), (6) (1980). The commissioner of the department investigated and found probable cause that there was a violation. The department attempted without success to conciliate the matter.

On October 9, 1979, a State Hearing Examiner found the national organization in violation of Minn. Stat. § 363.03(3) (1980), the pertinent part of which reads:

It is an unfair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.

The Examiner held that the national organization discriminated unfairly on the basis of sex by refusing to let women purchase individual memberships. He enjoined the national organization from such discrimination in any of its chapter affiliates within Minnesota, and from taking sanctions against any of them for selling individual memberships to women.

The national organization responded with a petition for review of the Examiner's order to the Ramsey County District Court, and commenced an action, in the United States District Court for the State of Minnesota, for the purpose of reserving determination of federal constitutional claims arising from the application of Minn. Stat. § 363.03(3) (1980). The federal district court, in an attempt to expedite a decision of the pivotal issue, certified to this court the question of whether this national organization is a "'place of public accommodation' within the meaning of Minn. Stat. § 363.01, Subdivision 18?"

Legislative guidance

In Minn. Stat. § 363.01(18) (1980) the legislature expressed its own special and unusually broad definition of the term "place of public accommodation": "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise

made available to the public." The legislature defines a term only because it intends in some measure to depart from the ordinary sense of that term. Thus, there is a presumption that we are not to substitute the literal, ordinary meaning of "place of public accommodation" for the definition the legislature has provided.

The legislature has, moreover, cautioned us against narrowly construing any of the provisions of Minn. Stat. § 363.03 (1980). It has broadened the term "place of public accommodation" to mean "a business * * * facility of any kind * * * whose goods * * * [and] privileges * * * are sold, or otherwise made available to the public". Minn. Stat. § 363.01(18) (1980). It has also expressly required a broad construction of all provisions of the statute by order of Minn. Stat. § 363.11 (1980) which reads, in pertinent part: "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." Minn. Stat. § 363.12 (1980) states those purposes to be "to secure for persons in this state, freedom from discrimination * * *." To understand accurately what those purposes here require in a construction of Minn. Stat. § 363.01(18) (1980), we must review the history of that provision and of Minn. Stat. § 363.03(3) (1980) whose key term it defines.

Legislative history

In 1885, ten years before the United States Supreme Court put its imprimatur on the "separate but equal" fiction justifying the Jim Crow laws, the legislature of the State of Minnesota chose a different course, that of "full and equal" privileges, as it enacted this statute:

That all persons within the jurisdiction of the state of Minnesota shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and

privileges of inns, public conveyances on land or water, theatres and places of public amusements, restaurants and barber shops, subject only to the conditions and limitations established by law and applicable alike to all citizens of every race and color, regardless of any previous condition of servitude.¹

In 1897, the legislature broadened the scope of the statute by increasing the number and kind of enumerated sites on which a person would be held to have violated the statute if that person excluded

any other person within the jurisdiction of the state of Minnesota, on account of race, color or previous condition of servitude, from the full and equal enjoyment of any accommodation, advantage, facility or privilege, furnished by innkeepers, hotel keepers, managers or lessees, common carriers or by owners, managers or lessees of theaters or other places of amusement, or public conveyance on land or water, restaurants, barbershops, eating houses, *or other places of public resort, refreshments, accommodation or entertainment, or*

Denies, or aids or incites another to deny any other person because of race, creed or color, or previous condition of servitude, the full and equal enjoyment of any of the accommodations, advantages, facilities and privileges of any hotel, inn, tavern, restaurant, eating house, soda water fountain, ice cream parlor, public conveyance on land or water, theater, barbershop *or other place of public refreshment*, amusement, instruction, accommodation or entertainment, * * *.²

¹ Act of March 7, 1885, ch. 224, § 1, 1885 Minn. Laws 295, 296.

² Act of April 23, 1897, ch. 349, §§ 2-3, 1897 Minn. Laws 616 (emphasis added).

We note that the legislature intended the statute to be applied to both fixed sites (e.g., hotels and restaurants) and mobile sites (e.g., public conveyances). Such sites were not to be limited to those enumerated, but were to include "other places of public * * * refreshment * * *."

This court held, in 1898, that the anti-discrimination statute had not been violated when a saloon keeper refused to sell a glass of beer to a former slave, solely because of that customer's race and color. *Rhone v. Loomis*, 74 Minn. 200, 77 N.W. 31 (1898). Within a year the legislature overruled that narrow construction with an amendment that added "saloons" to the enumerated list of fixed and mobile sites.³

In 1905, the legislature simplified the statute, deleting enumerated kinds of managers (e.g., hotel keepers), retaining most of the enumerated kinds of fixed and mobile sites and the broadly inclusive provision as to "other places of refreshment, entertainment, or accommodation." Minn. Rev. Laws (1905) ch. 55, § 2812.⁴ In 1943 the legislature again extended the scope of the statute, amending it to prohibit discrimination based on "national origin or religion."⁵

In 1965, the legislature split the anti-discrimination in public accommodations statute, leaving in one statute the description of what constituted prohibited discrimination, Minn. Stat. § 327.09, subd. 1 (1965), and shifting the actual

³ Act of March 6, 1899, ch. 41, § 1, 1899 Minn. Laws 38, 38-39.

⁴ Minn. Rev. Laws ch. 55 (1905) provided in pertinent part that: "No person shall be excluded, on account of race or color, from full and equal enjoyment of any accommodation, advantage, or privilege furnished by public conveyances, theaters, or other public places of amusement, or by hotels, barber shops, saloons, restaurants, or other places of refreshment, entertainment, or accommodation."

⁵ Act of April 23, 1943, ch. 579, § 7321, 1943 Minn. Laws 831, 832.

prohibition to subdivision 3 of a new, unfair discriminatory practices statute, Minn. Stat. § 363.03 (1965).^{*} Thus, Minn. Stat. § 363.03(3) (1965) read: "*Public accommodation:* (1) It is unfair discriminatory practice for any person to engage in an act forbidden by Minnesota Statutes 1961, Section 327.09." In 1967, the legislature revised subdivision 3; instead of prohibiting acts forbidden by Minn. Stat. § 327.09 (1967), it now had its own description of unfair discrimination that it prohibited within a scope far broader than that of the other statute, still in force, to which it had originally been attached and to which it had subsequently referred.[†] The broadening of that scope is best seen by a comparison of the two statutes. The older retained statute, Minn. Stat. § 327.09 (1967) reads:

No person shall be excluded, on account of race, color, national origin, or religion from full and equal enjoyment of any accommodation, advantage, or privilege furnished by public conveyances, theaters, or other public places of amusement, or by hotels, barber shops, saloons, restaurants, or other places of refreshments, entertainment, or accommodations.

The newer statute, Minn. Stat. § 363.03(3) (1967), reads:

Public accommodations. It is an unfair discriminatory practice:

To deny an individual or group of individuals the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, or national origin.

^{*} Act of May 21, 1965, ch. 585, 1965 Minn. Laws 854; Act of May 21, 1965, ch. 586, 1965 Minn. Laws 854.

[†] Act of May 25, 1967, ch. 397, § 14, 1967 Minn. Laws 1932, 1938.

Both statutes prohibit the discriminatory denial of the full and equal enjoyment of advantages and privileges of certain kinds of sites. The older statute enumerated some of those kinds of sites, fixed and mobile. The new statute expanded that scope; it added to the prohibitions the discriminatory denial of the full and equal enjoyment of goods, services, and facilities; it encompassed more than the previous kinds of sites, for the legislature used not an enumerated list, but one broadly inclusive term—"place of public accommodation"—and the legislature defined that term to mean: "a business * * * facility of any kind * * * whose goods * * * [and] privileges * * * are extended, offered, sold, or otherwise made available to the public." Minn. Stat. § 363.01(18) (1967).

Thus, while the older statute contemplated only certain fixed and mobile sites, the new statute encompasses a "business facility of any kind," whether fixed or mobile. While the older statute concentrated on the kinds of sites where discrimination would be prohibited, the new statute focuses on *conduct* in which discrimination would be prohibited and thus speaks not of a business facility *where* goods and privileges are offered, but rather, of "a business * * * facility of any kind * * * whose goods * * * [and] privileges are * * * offered, sold, or otherwise made available to the public." Minn. Stat. § 363.01(18) (1967) (*emphasis added*). The question for decision is whether that statutory definition encompasses the national organization now before this court. We turn to examine that organization.

Characteristics and practices of the national organization

Our examination of the national organization (and its local affiliates) proceeds along three lines set out in Minn.

Stat. § 363.01(18) (1980): (1) is the national organization a *business* in that it sells goods and extends privileges in exchange for annual membership dues?; (2) is the national organization a *public* business in that it solicits and recruits dues paying members but is unselective in admitting them?; and (3) is the national organization a public business *facility* in that it continuously recruits and sells memberships at sites within the State of Minnesota? The record before us clearly reveals that the answers to those questions are affirmative.

We address first whether the national organization is a *business*. The national organization urges this court to draw a distinction between an organization's internal activities (e.g., membership dues) and its external activities (e.g., inviting the public to participate in the organization and the activities it conducts). With this distinction the national organization contends that membership in it is equivalent to ownership of the organization; it then concludes that ownership, or a share of ownership of an organization, is beyond the scope of Minn. Stat. § 363.01(18) (1980), for that subdivision concerns only the goods and privileges offered or sold to the public by a business, and does not concern its ownership.

To be substantiated, the analogy would have to be borne out, in the record, by the way the national organization regards its current and prospective members, i.e. as its present and potential owners, rather than as its customers. The record before us reveals a national organization that regards its members more as customers than as owners. The national organization's *Officers' & Directors' Guide 1978-79* refers to members as the officers' "customers." (Exhibit 6,

p. 27). The national organization's *Recruitment Manual* has this preface to its recommended sales approach to prospective members: "JAYCEES, THE PRODUCT you are selling, is outstanding from any angle. *Jaycees is the 'best value' you can get.*" (Exhibit 24, p. 5) (emphasis in original). The *Recruitment Manual* cautions that "[o]nce a young man becomes a member, the responsibility to deliver the goods you sold him begins." (Exhibit 24, p. 1). The national organization's *Regional Director's Handbook 1977-78* discusses "How to Sell Jaycees" and reminds the directors to "Know your product." (Exhibit 44, p. 21).

The product being sold is membership in an organization whose aim is the advancement of its members. Thus, the national organization's *Chapter President's Management Handbook 1977-78* reminds the presidents of their responsibility to ensure that those holding individual memberships "will indeed have a slight edge in life over the non-Jaycee * * *." (Exhibit 2, p. 36). This "edge" that members obtain takes several forms. The president of the national organization, in letters published in *Future* (the official publication of the organization), maintains that it is "the greatest young men's leadership-training organization * * *." *Future*, Jan.-Feb. 1979, at 4 (Exhibit 55); *Future*, March-April 1979, at 5 (Exhibit 54). The organization asks business firms to pay the dues of individual memberships for a number of their employees; the fact that firms often do so suggests that those employees are viewed by their firms as receiving an edge, and that may help them when they are considered for promotion. Those holding individual memberships and who become officers in the organization thereby receive enhanced leadership experience and enjoy the enhanced privileges and advantages of making contacts with

others, often business contacts. In this regard we note that the national organization has successfully sued under the trade-mark laws to have one of its disaffiliated chapters enjoined from infringing on its name and from engaging in unfair competition with the national organization, *United State Jaycees v. San Francisco Junior Chamber of Commerce*, 513 F.2d 1226 (9th Cir. 1975); the concurring opinion of Judge Ely observed that "it seems clear that the term 'Junior Chamber of Commerce' does refer to the specific source of a 'product' (the National/Jaycees) * * *." *Id.*

By virtue of its sale of individual memberships (with the accompanying goods and privileges) the national organization is a *business*.

Is the national organization a *public* business? The national organization contends that it is a private organization; its brief cites three decisions by Circuit Courts of Appeal and claims that these upheld the non-public character of the national organization. See *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975); *Junior Chamber of Commerce v. Missouri State Junior Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975); *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*, 495 F.2d 883 (10th Cir.) *cert. denied*, 419 U.S. 1026 (1974). Those decisions, however, are inapposite. In each of them the issue was whether the national organization's receipt of federal funds and its status as a tax exempt organization constituted state action sufficient to subject it to scrutiny under a federal constitutional standard. All three circuit courts answered that question in the negative. To hold, however, that by such activities the national organization is not an entity of state action is far from holding that it is a private organization, and, in fact,

gives no insight to the construction of the statute in controversy.

The national organization contends that the most relevant reported case is the Oregon Supreme Court's decision that Cub Scouts were not within the definition of a "place of public accommodation," and, therefore, could exclude girls from membership. *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976). Because of its reasoning, the decision is irrelevant to the present controversy. The Oregon Supreme Court conceded that the Boy Scouts of America may not be a "distinctly private" club so as to come within the Oregon statute's exemption of private clubs. 275 Or. at 335, 551 P.2d at 469.* The court relied almost entirely on the statute's legislative history that showed that there was some doubt as to whether the Y.M.C.A. and the Y.W.C.A. were "places of public accommodation." The court reasoned, then, that by analogy the Oregon Public Accommodation Act was not intended "to include the Boy Scouts of America, at least to the extent of requiring it to accept applications by girls for membership." 275 Or. at 336, 551 P.2d at 469. The statute in controversy here has quite different legislative history. Therefore, the Supreme Court of Oregon's

* The pertinent statute reads:

(1) A place of public accommodation, subject to the exclusion in subsection (2) of this section, means any place or service offering to the public accommodations, advantages, facilities, or privileges whether in the nature of goods, services, lodgings, amusements or otherwise.

(2) However, a place of public accommodation does not include any institution, bona fide club or place of accommodation which is in its nature distinctly private.

Or. Rev. Stat. § 30.875 (1979).

decision in *Schwenk* provides neither analogy for nor insight into the question before this court.⁹

There are, however, cases that provide criteria for deciding, in the context of a public accommodation statute, whether a group is private or public. See *Nesmith v. Young Men's Christian Association*, 397 F.2d 96 (4th Cir. 1968); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974); *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970). Two criteria tend to be used: (1) the selectiveness of the group in the admission of members, i.e., standards and a formal procedure by which membership is restricted; and (2) the existence of limits on the size of the membership. See *Nesmith*, 397 F.2d at 102; *Cornelius*, 382 F. Supp. at 1203; *Wright*, 315 F. Supp. at 1153.

The national organization would have us disregard these clear standards, or to observe, instead, that Minn. Stat. § 363.01(18) (1980) makes no mention of size as a criterion. Thus, it argues to apply such a test would leave officers of

⁹ Cf. *Graham v. Kold Kist Beverage Ice, Inc.*, 43 Or.App. 1037, 607 P.2d 759 (Or. 1979) (construing Or. Rev. Stat. § 30.675 (1979)), decided since *Schwenk*, and holding that "a corporation engaged in the wholesale business of selling commercial equipment at wholesale for use in retail stores * * *" is not engaged in the sale of goods "to the public" and is, therefore, not a "public accommodation." *Id.* at —, 607 P.2d at 762. The wholesaler had agreed to sell its ice machines to plaintiff Graham and then refused when it discovered that he was black. The decision relies on *Schwenk*. If *Graham* is not reversed by the Oregon Supreme Court, then there is yet another reason for this court to find *Schwenk* an inapposite analogy; under Minn. Stat. § 363.01(18) (1980) one could not argue that a wholesaler was not a "public accommodation," for it undoubtedly would be a "business"—and would be guilty of violating the statute if it so engaged in racial discrimination. *Schwenk* is, therefore, of dubious value in deciding the present case.

small organizations wondering whether their group has become too big to avoid the criminal penalties of the statute.

The national organization's contention lacks merit. A public organization can avoid criminal penalties by simply not engaging in prohibited, unfair discrimination. Private associations and organizations—those, for example, that are selective in membership—are unaffected by Minn. Stat. § 363.01 (18) (1980). Any suggestion that our decision today will affect such groups is unfounded.

We, therefore, reject the national organization's suggestion that it be viewed analogously to private organizations such as the Kiwanis International Organization. Instead, we look at what this national organization is by itself. The record before us reveals a national organization that strives for growth, especially in "individual memberships"; it is unselective in those to whom it sells its memberships; selectiveness occurs only in the privileges and benefits it accords to those holding one kind of membership rather than another.

Counsel for the national organization contended, in oral argument, that a process of "natural selection" operates to make its membership selective. We find that process unexplained, unsupported, and unpersuasive. We find, in fact, that the national organization encourages continuous recruitment and discourages the use of any selection criteria. More than 80% of the national officers' time is devoted to spurring on the sale of memberships. The *Regional Director's Handbook 1977-78* advises: "Don't set membership goals for chapters. Let them set their own (as long as they plan an increase in membership)." (Exhibit 44, p. 14) (emphasis in original). The national organization's *Committee Chairman's Workbook*, in its instructions on how a chairman should present a project for his board's approval, proclaims

that "Jaycees are in the *People* business—not the project business" (Exhibit 43, p. 2) (emphasis in original) and advises the chairman to emphasize and link "Publicity Value and Recruitment Value. If your project will get the chapter's name in the paper and will possibly result in a few new members for the chapter, be sure that these facts 'headline' your presentation. It's sure to 'perk up their interest' in your project." (Exhibit 43, p. 5). More than half of the organization's individual and group achievement awards are conditioned, in part, upon recruitment achievement. (Exhibit 76). The organization encourages record breaking performance in selling memberships, e.g., most in a year by one person (348), most in a month (134), most in a lifetime (1,586). (Exhibit 70, p. 20). This continuous concern for growth undercuts the national organization's claim to be a private organization.

Most important, though, is the absence of selection criteria. This is evinced by the national organization's *Officer & Directors' Guide 1977-78* which advises that the emphasis in recruitment be on quantity rather than quality: "What is your obligation as Jaycees? Is it to only recruit a chosen few who * * * are deemed to be quality members? * * * How you sign up a member is not nearly as important as what you do with that member once he has been inducted." (Exhibit 52, p. 21). According to Lowell Larson, the Executive Director for the affiliated organization of Minnesota, the national organization does not publish anything with respect to criteria that local chapters should use to select their members; there is, instead, an emphasis on soliciting memberships from "as many people and as diverse as possible." (Hearing Transcript, p. 112). Mr. Larson further testified that, to his knowledge, there has never been a rejec-

tion of any application for membership. (Hearing Transcript, p. 135). By virtue of its unselective, vigorous sale of memberships, the national organization is a *public* business.

We pass to the last and seemingly most difficult question: Is this national organization a public business *facility*? The national organization contends that only if it were to "establish a business at a physical location within the State of Minnesota, and invite the patronage of the general public * * *" would that "place" or "facility" constitute a place of public accommodation under Minn. Stat. § 363.01(18) (1980). Brief for Appellant at 17. That argument substitutes a literal, ordinary definition of "place of public accommodation" for the one enacted by the legislature. The history of the anti-discrimination statutes shows that the scope of the older statute, still in force, Minn. Stat. § 327.09 (1980), concentrated on locations and encompassed both fixed and mobile sites. The newer statute, in controversy here, Minn. Stat. § 363.01(18) (1980), focuses on the *conduct* of a "business facility of any kind." We are not persuaded by analogies to hotels, restaurants, and "hot tamale stand[s]". Brief for Appellant at 17.

Food and lodging do not exhaust the category of a "business * * * facility of any kind * * * whose goods, * * * privileges, [and] advantages are * * * sold or otherwise made available to the public." Minn. Stat. § 363.01(18) (1980) (emphases added). Leadership skills are "goods," business contacts and employment promotions are "privileges" and "advantages," and each site in the State of Minnesota where the sale of those "goods" is solicited, promoted, and consummated is unquestionably a "business facility."

If we were to look for a fixed site of the national organization's "business facility" we would find it in the affiliated state organization's headquarters in Chaska, Minnesota, where the state organization's officers devote much of their time to promoting the solicitation and sale of memberships by the local chapters.

If we were to look for mobile sites of the national organization's "business facilities" we would find them in the sometimes door-to-door, company-to-company solicitation of members for the organization, and we would find them in the oft-shifted sites at which the affiliated local chapters hold meetings during part of which a sales approach is usually made to prospective members invited to the meeting for that purpose. See *Future*, March-April 1979, at 24 ("Many chapters use refreshments as a means to get [membership] prospects to the meeting, * * * if that is the only way—use it." quoting *New Recruitment Manual* (Exhibit 54)). A variety of enterprises that serve the public do not extend their goods and privileges from the same physical location (e.g. electricians, locksmiths, learning-at-home courses), and often they do not own or lease the sites at which they offer their goods and privileges. Cf. *First National Bank v. Dickinson*, 396 U.S. 122, 137 (1969), (holding that an armoured car picking up merchants' cash boxes and checks is a *branch bank, a place of business*, under § 7 of the McFadden Act.)

An instructive analogy can be found in a decision by the New Jersey Appellate Division that held Little League to be a "place of public accommodation." *National Organization for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33, *aff'd mem.*, 67 N.J. 320, 338 A.2d 198 (1974). Unlike the new statute in the instant case, the New

Jersey statute does not provide a brief definition of "place of public accommodation"; instead, it enumerates 65 varieties of such places.¹⁰ Little League was not one of the enu-

¹⁰ The pertinent statute reads:

'A place of public accommodation' shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodations of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof, any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin or ancestry, in the admission of students.

merated varieties. The New Jersey court considered a broad construction of "place" to be appropriate because "the statutory noun 'place' (of public accommodation) is a term of convenience, not of limitation." 127 N.J. Super. at 531, 318 A.2d at 37. The court then observed that the "place," in the case of Little League, is the ball field. Presumably the court was not unaware of the fact that Little League often does not own the real estate on which its ball fields are located, for as the court noted:

[W]e discern nothing in the statute or its underlying purposes to persuade us that what would otherwise be a place of public accommodation is any less so because its management and sponsorship is by a nonprofit or membership organization rather than a commercial enterprise, or because it does not have exclusive use of possession of the site of its operations.

Id. at 531-32, 318 A.2d at 38.

The national organization before this court attempts to distinguish the *Little League* case on two grounds. First, it argues that Little League dominates organized baseball for children, whereas this national organization does not dominate the field of organized community services. That distinction is irrelevant to the question of what constitutes a "place of public accommodation," because no insight into that question can be drawn from the concept of such domination.

The national organization's second basis for distinguishing *Little League* is that Little League, by making extensive use of local community owned facilities, thereby engaged in discrimination on public property and thus involved a unit of government. The New Jersey court did not decide the case on, or even mention that as a basis for its decision.

Again, the distinction does not detract from the significant fact that the New Jersey Supreme Court held that a "place of public accommodation" or a "facility" is less a matter of whether the organization operates on a permanent site, and more a matter of whether the organization engages in activities in places to which an unselected public is given an open invitation.

The question, therefore, of what constitutes a "facility," or more precisely, a "public business facility" turns ultimately on whether the organization invites only a screened and selected portion of the public, or whether, instead, it has a standing, open invitation to an unscreened, unselected, and unlimited number of persons from the general public. Little League did little screening except to age and sex, and the New Jersey Supreme Court affirmed a decision that Little League constituted a "place of public accommodation." By contrast, the national organization before this court does even less screening because it admits women to associate membership, and therefore, it has given an open invitation to virtually anyone to become a dues paying individual or associate member.

The meeting place to which that unscreened, unselected, and unlimited number of persons is invited, constitutes as we see it a public business *facility*.

We have discussed the term "facility" with regards to sites, both fixed and mobile. We acknowledge, however, that courts in other jurisdictions have construed the term more liberally, and have done so since the late Nineteenth Century—a time when this state's anti-discrimination statute was new and included mention of "facilities." Thus, in 1898, the Supreme Court of Montana had to decide whether money raised by a tax levied, under a statute, for the pur-

pose of furnishing "additional school facilities" could be used to pay salaries of teachers; the question depended upon the scope of the expression "additional school facilities" as employed in the statute. The court rejected a narrow interpretation that would have limited such "facilities" to inanimate objects. *State ex rel. Knight v. Cave*, 20 Mont. 468, 52 P. 200 (1898). As the court observed,

[t]hat which aids, assists, or makes more easy the acquisition of knowledge is a convenience and an advantage, and is clearly a "facility." Books, maps, globes, and charts are facilities to the imparting of knowledge. * * * But the meaning of the word is not limited to inanimate bodies or things. *Men are often facilities*. Without a crew to man his vessel, the master of a ship would not have the necessary facilities. A school with a complement of pupils in every room, but lacking teachers, would certainly not have facilities to carry on educational work. * * * Parents often remove their families to a place with good school or educational facilities, the chief reason actuating them being the quality of teachers, and not the mere inanimate advantages. * * * Teachers are the means of imparting knowledge to pupils, and are therefore educational facilities.

20 Mont. at 475-76, 52 P. at 203 (emphasis added). *Accord*, *Nekoosa-Edwards Paper Co. v. Railroad Commission of Wisconsin*, 193 Wis. 538, 547, 213 N.W. 633, 636 (1927) ("Facilities" includes human agencies) ("We see no difficulty in holding that the switch engine with its crew * * * constitutes a facility * * *"); *see Cheney v. Tolliver*, 234 Ark. 978, 977, 356 S.W. 2d 636, 634 (1962).

We need not decide whether "facilities" should be construed to include persons. What we decide here is that an organization engaged in the business of seeking to advance its members and to add to their ranks by assiduously selling memberships in this state is a "public business facility." In more familiar terms, such an organization has more than the "minimum contacts" to qualify as doing business in this state, and its facilities are anywhere it promotes, solicits, and engages in the sale of memberships on an unselective basis. We have discussed this question, for the most part, without reference to the prohibited kind of discrimination involved in this case. The certified question does not ask us to weigh the merits of this organization's business policies. If the national organization now before this court were conducting its business by discriminating on the basis of race, prohibited in Minnesota since 1885, we would have no difficulty holding that its activity was prohibited; the fact that the discrimination in this case is based on sex, prohibited in Minnesota since 1972,¹¹ in no way alters our decision and its grounds. The answer to the certified question is affirmative.

SHERAN, Chief Justice (dissenting).

Although the result reached in the majority opinion is felicitous, I cannot believe that the members of the Minnesota legislature who voted for the law we have been called upon to construe thought the Junior Chamber of Commerce, a service organization, to be "a place of public accommodation." The obligation of the judiciary is to give that meaning to words accorded by common experience and understanding. To go beyond this is to intrude upon the

¹¹ Act of May 24, 1973, ch. 729, § 3, 1973 Minn. Laws 2158, 2164.

policy-making function of the legislature. The majority opinion does that in this case to a degree which compels this expression of dissent.

PETERSON, Justice.

I join in the dissent of Chief Justice Sheran.

TODD, Justice.

I join in the dissent of Chief Justice Sheran.

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
FOR THE DEPARTMENT OF HUMAN RIGHTS

STATE OF MINNESOTA, BY WILLIAM L.
WILSON, AND HIS SUCCESSOR,
MARILYN E. McCLURE, COMMISSIONER,
DEPARTMENT OF HUMAN RIGHTS,

Complainant,

vs.

THE UNITED STATES JAYCEES,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on for hearing on April 23, 1979, before State Hearing Examiner George A. Beck in the Hearing Room of the Minnesota Department of Commerce on the Fifth Floor of the Metro Square Building located in Saint Paul, Minnesota. The hearing continued to the following day. The final written brief in this matter was filed on September 11, 1979, and the record closed on that date.

Richard L. Varco, Jr., Special Assistant Attorney General, 240 Bremer Building, Saint Paul, Minnesota 55101, appeared on behalf of the Complainant. Clay R. Moore, Esq. of the firm of Mackall, Crounse and Moore, 1100 First National Bank Building, Minneapolis, Minnesota 55402, and Carl D. Hall, Jr., Esq. of the firm of Hall, Sublett, McCormick and Andrew, 1776 Williams Center, Tulsa, Oklahoma 74172, appeared on behalf of the Respondent.

The following witnesses testified at the hearing: Lowell Larson, Valdis Vavere, Daniel Aberg, Kathryn Ebert, Kathleen Hawn, Sally Pedersen, Donald G. Varnadore and Gary W. Flakne.

Ninety written exhibits were offered and received on behalf of the Complainant and ten written exhibits were offered and received on behalf of the Respondent. A list of exhibits is attached to this Report.

Based upon the testimony, exhibits and briefs filed herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

Procedural Matters

1. That on December 14, 1978, a charge of discrimination was filed with the Department of Human Rights by four members of the St. Paul Chapter of the United States Jaycees, including its president, alleging a violation of Minn. Stat. Sec. 363.03 by the respondent. (Ex. 89) A copy of the charge was served upon the respondent by certified mail on December 15, 1978. (Exs. 90A, 90B, 91, 92)

2. On December 19, 1978, a charge of discrimination was filed with the Department of Human Rights by four members of the Minneapolis Chapter of the United States Jaycees, including its president, alleging a violation of Minn. Stat. Sec. 363.03. (Exs. 81, 82, 83, 84) A copy of the charges was served upon the respondent by certified mail on December 20, 1978. (Exs. 85, 86, 87, 88A, 88B)

3. Subsequent to the filing of these charges, the Department conducted an investigation of the allegations contained in the charges, and on January 25, 1979, the Commissioner of the Department of Human Rights found probable cause to believe that the respondent had committed a violation of Minn. Stat. Sec. 363.03, subds. 3, 6 and 7 (1978). This find-

ing of probable cause was served upon the respondent, together with a notice of and order for hearing in this matter, by certified mail on January 25, 1979. (Exs. 93, 94, 95)

4. The Department of Human Rights has attempted to conciliate this matter without success.

5. On February 27, 1979, the respondent filed an action in the United States District Court for the District of Minnesota entitled, *The United States Jaycees v. William L. Wilson, Commissioner, Minnesota Department of Human Rights, and Warren Spannaus, Attorney General of the State of Minnesota*. In that action, the U.S. Jaycees asked that the Court declare Minn. Stat. Sec. 363.01, subd. 18 and Minn. Stat. Sec. 363.03, subd. 3, 6, and 7, unconstitutional facially and as applied to the respondents in this administrative proceeding. The U.S. Jaycees asked the Court to abstain from a determination of the merits of the constitutional claims until the conclusion of this administrative proceeding.

6. In this administrative proceeding, the respondent has stated its intention to reserve for determination by the United States District Court all federal constitutional claims challenging the validity and application of the afore-cited statutes. This reservation is asserted under the authority of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 11 L.Ed.2d 440, 34 S. Ct. 461 (1964). The *England* case generally holds that a federal court litigant who is remitted to state court under the doctrine of abstention may preserve his right to return to federal court for the disposition of his federal constitutional claims where he refuses to litigate his federal constitutional claims in state court. The complainant has consented to this procedure.

7. By Order dated June 11, 1979, U.S. District Judge Miles Lord dismissed the U.S. Jaycees action without preju-

dice. In its Order, which was based upon a stipulation by the parties, the Court stated that the U.S. Jaycees could, pursuant to *England, supra*, refrain from litigating any constitutional claims in this state administrative proceeding and subsequently recommence the federal action to assert said federal constitutional claims in the event that the state proceedings were determined adversely to the U.S. Jaycees.

The U.S. Jaycees

8. The United States Jaycees is a non-profit corporation organized under the laws of the state of Missouri (T. B6, Ex. J) with its headquarters located in Tulsa, Oklahoma. (T. B7) The organization is exempt from federal income taxes. (Ex. H, Ex. I; T. B36) There are approximately 8,800 local Jaycee chapters and 51 state organizations affiliated with the U.S. Jaycees. (T. B9) Nationwide, there are approximately 386,000 individual members. (T. B21) The respondent maintains a regional office at Chaska, Minnesota. (Ex. 80, p. 7) The ultimate policymaking body of the U.S. Jaycees is an annual national convention consisting of delegates from each local chapter. (T. B16) The convention elects a national President, who, together with a Board of Directors and an Executive Committee, governs the organization. The State Presidents constitute a majority of the national Board of Directors. (T. B14-16; Ex. 1, pp. 9-11)

9. The By-laws of the U.S. Jaycees define an individual member (or "regular member"; T. A71) as follows:

BY-LAW 4-2.

INDIVIDUAL MEMBERS

Young men between the ages of eighteen (18) and thirty-five (35), inclusive, of Local Organization Members in good standing in this Corporation shall be considered Individual Members of this Corporation (un-

less the ages for membership shall have been changed by the State Organization Member as hereinabove permitted by By-Law 4-4.A.). Such Individual Members shall be qualified by, and represented through, the Local Organization Member so long as he shall pay the dues to the Local Organization specified in its by-laws, constitution or articles of incorporation (which shall include a subscription to FUTURE Magazine). If any Individual Member shall arrive at the age of thirty-six (36) after the beginning of his Individual Membership Anniversary Date, such member shall be deemed an Individual Member until his next Anniversary Date, or in the case of any Individual Member holding office in the Corporation, a State Organization Member, or a Local Organization Member, until completion of such term of office; provided that no Individual Member shall be permitted to hold any such office if he has reached age thirty-six (36) prior to the commencement of the term of such office, except as otherwise provided herein.

(Ex. 1, pp. 3-4; T. B12)

10. An associate individual member is defined in the by-laws in the following language:

BY-LAW 4-3.

ASSOCIATE INDIVIDUAL MEMBERS

An Associate Individual Member is a business concern, association, group or individual not qualified by these By-Laws and Policy to be an Individual Member of a Local Organization Member. An Associate Individual Member is not an Individual Member of The United States Jaycees and shall not have the right to vote or the right to be an officer or director in The United

States Jaycees, a State Organization Member or a Local Organization Member.

(Ex. 1, p. 4; T. A159; T. B12) An associate member may participate in Jaycee programs, but cannot receive awards. (T. A49, A156, A161)

11. By-laws describe a local organization member (or "local chapter") as follows:

BY-LAW 4-4.

LOCAL ORGANIZATION MEMBERS

A. Any young men's organization of good repute existing in any community within the United States, organized for purposes similar to and consistent with those of this Corporation, and whose officers and Individual Members are young men between the ages of eighteen (18) and thirty-five (35) years of age, inclusive, shall be eligible for affiliation as a Local Organization Member; provided, however, that any State Organization Member, at its option, may restrict the minimum age of members for Individual Members of such State Organization Member to an age more than eighteen (18) but not more than twenty-one (21) years of age. (Ex. 1, p. 4; T. B10)

12. These by-laws allow women to be associate members, but not regular members and therefore prohibit women from voting or serving as a local chapter president, vice president or director, or as a state organization officer or regional or district director, or as a national officer or director. (T. A28, A107) Both the Minneapolis and St. Paul Chapters, which are local organization members, are currently in violation of By-law 4-4, (T. B11) and have adopted local By-laws which permit women to be individual members and, therefore, conflict with the respondent's by-laws (Ex. 16, 17)

13. In 1975 the national Jaycee convention voted by a margin of approximately 90% to 10% against changing a by-law to allow local chapters to admit women as regular members. (T. B22; Ex. 26, p. 20) That year, however, the national leadership set up a "pilot membership program" to allow local chapters in up to five states to accept women as regular local and state members. Three states, Alaska, Massachusetts, and the District of Columbia, voted to participate. (T. B23) The Minnesota State Convention voted in late 1975 or early 1976 not to participate in the "pilot program". (T. A121, B24) The "pilot program" was terminated by the National President in June of 1978. (T. B24) The 1978 national convention defeated, by a margin of approximately 78% to 22%, another motion to give local chapters the option to admit women as regular members. (T. B25; Ex. 26, p. 20)

The Local Chapters and Women Members

14. The Minneapolis Chapter of the U.S. Jaycees has admitted women as regular members since 1974, and has been in violation of By-law 4-4 since that time. (T. A120, A157) The chapter currently has approximately 150 to 180 women members of a total of 430. (T. A123; Ex. 57-60) Eight women now serve on the 26-person Board of Directors and women serve in the capacity of vice president and state delegate. (T. A124) Serving as an officer or director provides substantially greater leadership training and responsibility than general membership or serving as the chair of a single committee. (T. A161, A177, A197) From 1975 to June of 1978, the chapter has been subjected to sanctions for violation of the respondent's by-laws, such as its members being ineligible for state or national office, its membership not being counted in computing votes at national

conventions, and ineligibility for hosting national events. (T. A122) A Minneapolis woman member nominated by the chapter for a national award was not considered. (T. A141) By letter dated December 15, 1978, the Minneapolis Chapter was advised by the respondent's President that a January 19, 1979 meeting of respondent's Executive Board of Directors in Tulsa would vote on a motion to revoke the charter of the chapter for violation of the by-laws which restrict individual membership to men. (Ex. 78; T. A123, B27; Ex. 26, p. 21)

15. The St. Paul Chapter of the U.S. Jaycees has admitted women as regular members since 1975. (T. A168) Currently, the chapter has 400 members of whom approximately 100 are women. Women also serve on the chapter's Board of Directors. (T. A169; Ex. 5, 79) Because of its admission of women as full members, the chapter has had sanctions imposed against it similar to those imposed against the Minneapolis Chapter. (T. A168) By letter dated December 15, 1978, the St. Paul chapter was also advised by the National President that a January 19, 1979 meeting in Tulsa of the respondent's Executive Board of Directors would vote on a motion to revoke the chapter's charter for violation of the by-laws which restrict individual membership to men. (Ex. 77; T. A168, B27)

16. Kathryn Ebert has been a member of the Minneapolis Chapter of the Jaycees since February of 1975. She holds a B.A. degree from Northwestern University and is an interior architect employed by Dayton's Commercial Interiors. She is currently the project team leader for the interior design of the new Pillsbury Center in downtown Minneapolis. (T. A188-189) In 1976, Ebert became chairman of the chapter's training and development committee

and an ex officio member of the chapter's Board of Directors. Later in 1976, she became a member of the Board and headed the civic affairs committee. From 1976 to May of 1978, Ebert served as a Vice President of the Jaycee Foundation and as an executive committee member. As a Vice President, she supervised four committees and approximately 100 people. In April of 1977, Ebert was a candidate for President of the Minneapolis Chapter. (T. A190)

Ebert testified that her Jaycee participation allowed her to acquire speaking skills, leadership skills and organizational skills at a young age. She believes that this leadership development enabled her to gain a promotion by her employer to project team leader. (T. A191-192) She testified that being a Vice President was more valuable in terms of leadership development than being a committee chairman. (T. A197) She also commented that working with men in the Jaycees was beneficial since about 90% of her clients are men. (T. A195)

17. Kathleen Hawn has been a member of the St. Paul Chapter of the Jaycees since 1976. She is a graduate of Archbishop Murray High School in St. Paul and has been employed by Minnesota Mutual Life Insurance since July of 1977, where she is currently a methods analyst. (T. A198, A 202) While a Jaycee member, she has served as secretary and then director of the human natural resources committee, as a state delegate, and as a district director. She has chaired three major events for the St. Paul Jaycees and has received several awards including a gold key as an outstanding director. (T. A199)

Ms. Hawn testified that the Jaycees "Speak Up" program developed her speaking abilities and aided in her presenta-

tions at work. As a Jaycees director, she supervised others for the first time, learned how to plan and delegate, and gained self-confidence by working with management caliber people. (T. A204, A206) Ms. Hawn testified that taking one of her superiors to the Jaycees Bosses Night, at which she received an award, contributed to her later promotion to a job where she supervises three men and one women. (T. A201-203) Approximately 80% of the people she works with are men. (T. A205)

18. Sally Pedersen has been a Minneapolis Jaycee for two years and prior to that was a Jaycee in Rochester, New York for 3 1/2 years. (T. A207) She attended the University of Rochester and is currently employed as a customer support representative with Eastman Kodak Co. She began her career with Kodak as a lab technician and when she inquired about advancement, the personnel department suggested that she join the Jaycees. She later obtained her present position with a resume of Jaycee activities. (T. A210-211) She has recently successfully interviewed for a new position with Kodak. She had separate interviews lasting 30 to 40 minutes with seven men, each of whom inquired about her Jaycee activities. (T. A212) Her Jaycee activities have included serving on the Board of Directors in 1977-78. She is currently a vice president and supervises four committees and 40 to 50 people. (T. A208)

The Relationship of Local Chapters and the U.S. Jaycees

19. The U.S. Jaycees maintain a staff of approximately 83 to 84 persons in Tulsa. (T. B52) The respondent employs an executive director to develop programs with appropriate materials which may be implemented by local chapters. (Ex. 98, No. P-3) These programs are designed to accomplish the three Jaycee goals, namely, individual de-

velopment, community development and development of management ability. (T. A31-32; B41; Ex. 47) The programs or materials provided by respondent to local chapters relative to individual development include personal dynamics (Ex. 22), communication dynamics (Ex. 23), a speak-up program (Ex. 53, 38) and personal financial planning. (Ex. 38, 54) The program kits prepared by the U.S. Jaycees to promote community development include the Junior Athletic Championships (Ex. 40), Shooting Education, CPR, Energy Program, Government Affairs, and Institutional Chapters. (Ex. 39) The respondent publishes a wide range of materials related to chapter and state organization management such as Leadership Dynamics (Ex. 41, 42), Officers and Directors Guide (Ex. 6, 52), Chapter President's Management Handbook (Ex. 2) and others (Ex. 37, 43, 44, 51).

20. The local chapter may implement or decline to implement programs organized by respondent or may modify the programs to fit the local situation. (T. A34, A95, A99) The respondent believes that a new program is successful if approximately 1,000 of 8,800 local chapters pick it up. (T. B40) There are incentives to local chapters in the form of national awards for adoption of programs. (T. A109) Both the Minneapolis and St. Paul Chapters have adopted respondent's CPR program. (T. A154, A186) The state and local organizations may also initiate their own programs without respondent's approval (T. A94), for example, the state organization sponsors a "Jelly Week" with the proceeds of jelly sales being donated to help the mentally retarded (T. A96; Ex. 61); the Minneapolis Chapter sponsors an annual free Christmas dinner (T. A138, A150); and the St. Paul

Chapter sponsors the Patty Berg Golf Classic. (T. A178; Ex. 3)

21. The respondent also provides a wide range of products including personal items, travel accessories, casual wear, officer pins, awards, and gifts (Ex. 15) which may be purchased by members or non-members both through the mail and by telephone from the national office. (Ex. 80, p. 17; T. A80, B57) The products are featured in respondent's magazine. (Ex. 25) The Minnesota state office also maintains a number of respondent's products at its office for sale to local chapters and others. (T. A78, B57) The state organization receives a commission from respondent for its promotion of U.S. Jaycee products. (T. A79)

22. The Jaycee organization puts a great deal of emphasis on recruitment of new members. (Ex. 10, 11) The Minnesota State President spends approximately 80% of his time on recruitment related activities (T. A45), while the Minneapolis and St. Paul Presidents spend approximately half of their time on recruiting new members. (T. A125, A170) The respondent provides materials (Ex. 24, 45, 66, 70, 72, 73), contests and awards (T. A47, A58) and personnel (T. A53) to encourage and aid in signing up new members. The state and regional officers encourage the local chapters to acquire new members. (T. A132; Ex. 48, 50) The Minneapolis Chapter President estimated that 90% of his conversations with the state President and other officers concern recruitment. (T. A130; Ex. 69, 71)

23. The actual recruiting takes place at the local chapter level. (Ex. 12, 13; T. A90) The local chapter initially determines an applicant's eligibility (T. A91) although the Minneapolis and St. Paul Board of Directors routinely approve all applicants who are over 18 but not yet 35 years of

age. (T. A135, A175-176) In Minneapolis and St. Paul, a substantial number of members are recruited from the ranks of corporate management. (T. A183, A189, A148) This involves asking corporations to financially sponsor several of their employees. (Ex. 12; T. A125) Membership solicitation includes the statement that both men and women are eligible for membership. (Ex. 10, 11, 12) Some corporations have conditioned sponsorship upon allowing women as members. (T. A138-139)

A person accepted as a member by the local chapter automatically becomes a member of the Minnesota Jaycees and the U.S. Jaycees. The new regular member dues forwardable to the state Jaycee organization is \$24, and the regular member renewal amounts to \$19. Dues payment based on a computerized billing from the respondent (Ex. 56), are submitted on a monthly basis to the state organization which retains \$12.50 and remits the balance to the respondent. The respondent then sends along \$2.50 to the Jaycee International organization. (Ex. 35A-F; T. A72-74)

Other Testimony

24. Other national service organizations similar in structure to the U.S. Jaycees, such as Kiwanis International (Ex. A, p. 2; Ex. B), the International Association of Lions Club (Ex. D, p. 13), Rotary International (Ex. F, p. 217), Optimist International (Ex. G, p. 3) and the Association of Junior Leagues, Inc. (Ex. C, p. 4) have provisions in their constitutions or by-laws restricting membership on the basis of sex. (T. B65-66)

25. Undisputed testimony at the hearing showed that the Jaycee organization is different from other organizations in that it has a young, active membership (T. A87) and offers individual development programs in the areas

of personal, leadership and communications dynamics which are either unavailable or not available to the same degree in other organizations. (T. B54-55; Ex. 80, p. 6) A local chapter whose charter is revoked would suffer loss of the substantial goodwill and name recognition of the title "Jaycees" (T. A137, A140, A178, A182) as well as the loss of participation in Jaycee state and national conventions, seminars, insurance programs and awards, such as the Ten Outstanding Young Men selection. (Ex. 55, 76)

26. Gary W. Flakne, a member of the Minnesota House of Representatives from 1962 to 1973, and chief author in the House of the 1967 revision of the Human Rights statute, testified concerning that bill. (T. B68) The 1967 revision created the Department of Human Rights and broadened the statute to include a new definition of discrimination in public accommodations. (T. B82) Mr. Flakne testified that he could not recall any consideration at the time the law was passed as to whether or not organizations such as the Jaycees would be included within the definition of "public accommodations". (T. B84, 90)

27. That any of the foregoing Findings of Fact which might properly be termed Conclusions of Law are hereby adopted as such.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. That the Department of Human Rights gave proper notice of the hearing in this matter; that the Hearing Examiner has jurisdiction of this matter pursuant to Minn. Stat. Sec. 363.071 (1978) and Minn. Stat. Sec. 15.052 (1978); that the Department of Human Rights has fulfilled all

relevant, substantive and procedural requirements of law or rule.

2. That the complaint issued by the Commissioner in this matter was issued pursuant to Minn. Stat. Sec. 363.06 (1978).

3. Minn. Stat. Sec. 363.03, subd. 3 (1978) provides that:

It is an unfair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex. It is an unfair discriminatory practice for a taxicab company to discriminate in the access to, full utilization of or benefit from service because of a person's disability.

4. Minn Stat. Sec. 363.01, subd. 18 (1978) provides the following definition:

"Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

5. That the United States Jaycees discriminate on the basis of sex by denying women individual or regular membership.

6. That for the reasons set out in the Memorandum attached hereto, and incorporated herein by reference, the United States Jaycees are a place of public accommodation within the meaning of Minn. Stat. Sec. 363.01, subd. 18 (1978).

7. That the United States Jaycees has subjected the Minneapolis and St. Paul Chapters to sanctions and has announced its intention to revoke the charters of the Chapters because of their admission of women as individual or regular members.

8. That the United States Jaycees have therefore committed an unfair discriminatory practice in violation of Minn. Stat. Sec. 363.03, subd. 3 (1978).

9. Minn. Stat. Sec. 363.071, subd. 2 (1978) provides in part that:

. . . if the hearing examiner finds that the respondent has engaged in an unfair discriminatory practice, the hearing examiner shall issue an order directing the respondent to cease and desist from the unfair discriminatory practice found to exist and to take such affirmative action as in the judgment of the examiner will effectuate the purposes of this chapter.

Pursuant to the foregoing Conclusions of Law, the Hearing Examiner makes the following:

ORDER

It is hereby ordered that the United States Jaycees shall cease and desist and is hereby enjoined from:

(1) Revoking the charter of any Jaycee local organization member ("local chapter") or state organization member (the "Minnesota Jaycees") within the State of Minnesota or denying any privilege or right of membership, or otherwise discriminating in any manner against a local or state organization member within the State of Minnesota because either extends to women all the rights and privileges of individual or regular membership.

(2) Discriminating on the basis of sex against any member or applicant for membership of a Jaycee local chapter

within the State of Minnesota with respect to the terms, conditions, or privileges of membership in the local chapters or in the Minnesota Jaycees or in the United States Jaycees.

Dated: October 9, 1979.

GEORGE A. BECK

State Hearing Examiner

NOTICE

Pursuant to Minn. Stat. Sec. 363.071, subd. 2 (1978), this Order is the final decision in this case and under Minn. Stat. Sec. 362.072 (1978), the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. Sec. 15.0424, and Minn. Stat. Sec. 15.0425 (1978).

MEMORANDUM

Standing to Prosecute

The respondent has maintained that the named complainant, William L. Wilson, lacks standing to prosecute this matter since a successor has been appointed and confirmed. The matter of succession of public officials in state administrative proceedings is not treated in either statute or rule. In federal court (FRCP Rule 25(d)(i)) and Minnesota appellate practice (MRCAP Rule 143.04), succession is automatic while in district court in Minnesota substitution is by motion upon a showing that the successor intends to continue the action. (MRCP Rule 25) In the absence of any specific state administrative rule, the request for successor should be made by a motion pursuant to 9 MCAR Sec. 2.213 B.

In a September 4, 1979 letter, which accompanied the complainant's final brief in this case, complainant's attorney stated that "Commissioner McClure intends and has

intended to have this action continued." Complainant's reply brief added the present Commissioner's name to the title of the proceeding. This procedure would normally preclude any reply by the respondent, however, as a practical matter there is little for the respondent to say once the Commissioner indicates her intention to continue the prosecution in this matter. It appears that the specific functions which the statute requires the Commissioner to do, such as service of the charge, determination of probable cause, and issuance of a complaint were in fact performed by former Commissioner Wilson. Accordingly, since no prejudice has been shown, it is concluded that the addition of Commissioner McClure as a party should be allowed despite the procedural failure to accomplish the matter by a formal motion on the record pursuant to the appropriate rule.

Constitutional Questions

As set out in Findings of Fact No. 5-7, the parties to this case have agreed to reserve all federal constitutional claims for determination by the United States District Court. Notwithstanding this agreement, the respondent urges that two constitutional claims should be considered insofar as necessary to do so in order to abide by the maxim (codified at Minn. Stat. Sec. 645.17(3)) that statutes should not be interpreted in a manner which would render them unconstitutional. The respondent believes that subjecting its membership policy to the Minnesota Human Rights Act would (1) violate its First Amendment right to freedom of association, and (2) violate the due process clause of the Fourteenth Amendment since there are misdemeanor penal consequences and the statute is ambiguous and vague, requiring persons to guess at whether or not they might be included within its language. In deference to the greater ex-

pertise of the federal court and its Order relating to this matter, and recognizing that these questions would need to be redetermined upon appeal, these issues will not be extensively dealt with herein. The Examiner, after a careful review of the arguments and consideration of the authorities cited, is satisfied that the constitutional right to freedom of association will not protect unlawful discrimination by an organization which is not in fact private. *Bell v. Maryland*, 378 U.S. 226, 313-314, 12 L.Ed.2d 22, 84 S. Ct. 1814 (1964). Additionally, even though the Minnesota Human Rights Act contains a criminal or penal remedy, this does not mean that, in an action for civil relief, the statute must be construed by a criminal standard in regard to vagueness. Our court has stated that while a "criminal statute must be definite as to persons within the scope of a statute and the acts which are penalized" (emphasis added), "... where a statute contains remedial and penal provisions, the former are to be construed liberally and the latter strictly." *State v. Moseng*, 245 Minn. 263, 95 N.W.2d 6, 11 (1959).

Statutory Interpretation

The fundamental question to be decided in this proceeding is whether or not the United States Jaycees fall within the definition of "place of public accommodation" so that their admitted sex discrimination in regard to membership thereby becomes an unfair discriminatory practice prohibited by the Minnesota Human Rights Act. The complainant believes that the U.S. Jaycees are a "business . . . facility of any kind . . . whose goods, services, . . . privileges, advantages . . . are extended, offered, sold or otherwise made available to the public."

The existence of a legislative history for the statutory provisions in question would, of course, be particularly valuable in regard to the question of legislative intent. No such written history exists for the 1967 legislative session which session produced a substantial revision of the human rights law including the definition in question here. The chief author of the House bill, Gary Flakne, testified concerning his recollection of the passage of the legislation. The general rule is that the opinion of one legislator cannot be equated with or even considered when ascertaining legislative intent. 82 C.J.S. Statutes Sec. 354, *Iowa St. Educ. Assoc. —Iowa Higher Educ. Assoc. v. Public Employment Relations Board*, 269 N.W.2d 446, 448 (Ia. 1978), 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, Sec. 48.16 (4th ed. 1972) The most that can be gleaned from Mr. Flakne's testimony, however, is that the question of whether or not organizations such as the respondent might fall within the definition of "place of public accommodation" was simply not specifically considered by the legislature. (Finding of Fact No. 26).

The legislature did, however, provide some direct help in ascertaining its purpose. Minn. Stat. Sec. 363.11 (1978) provides in part that, "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." Minn. Stat. Sec. 363.12 (1978) also declares, in part, that:

Subdivision 1. It is the public policy of this state to secure for persons in this state, freedom from discrimination;

...

(3) In public accommodations because of race, color, creed, religion, national origin, sex, marital

status, disability and status in regard to public assistance;

As the legislative direction indicates, the Minnesota Human Rights Act is remedial legislation and as such should be liberally interpreted in order to suppress the evil and advance the remedy. "What is called a liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction." 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, Sec. 60.01, at 29 (4th ed. 1972)

The courts of other states have followed this general rule in interpreting their human rights acts. In *Ohio Civil Rights Comm. v. Lysyj*, 38 Ohio St. 2d 217, 313 N.E.2d 3 (1974), the court found a trailer park to be a place of public accommodation and observed that:

When determining the scope of the "public accommodations" amendments to Chapter 4112, the commission, initially, and the courts, upon review, are to construe these statutes liberally in order to effectuate the legislative purpose and fundamental policy implicit in their enactment, and to assure that the rights granted by the statute are not defeated by an overly restrictive interpretation. 313 N.E.2d at 6.

The language of the Minnesota definition of "public accommodations" places it among those states which have broader and more general definitions as opposed to those states that specifically list the businesses covered. The more general definition has the effect of more extensive coverage. *Discrimination in Access to Public Places: A Survey of State and Federal Accommodations Laws*, 7 N.Y.U. Review of Law and Social Change 215, 242 (Spring 1978)

The pre-1967 public accommodations provision in Minnesota law (which has not been explicitly repealed), Minn. Stat. Sec. 327.09 (1978) reads as follows:

No person shall be excluded, on account of race, color, national origin, or religion from full and equal enjoyment of any accommodation, advantage, or privilege furnished by public conveyances, theaters, or other public places of amusement, or by hotels, barber shops, saloons, restaurants, or other places of refreshments, entertainment, or accommodations.

The move from this more specific definition to the existing general language would seem to evidence a legislative intent to expand the coverage of the public accommodations provisions.

In the case of a statute which has a general applicability, its language may often appear to be ambiguous when applied to specific fact situations. It is because of this that the legislature's directives as to intent and purpose at Minn. Stat. Sec. 363.11 (1978) and Sec. 363.12 (1978) assume large importance. It is often held that:

Legislative purpose may also be a valuable guide to decision in cases where the effect of a statute or the situation at hand is unclear either because the situation was unforeseen at the time when the act was passed, in which case it represents a somewhat unorthodox way of speaking to say that the legislature had any real intent with reference to the unprovided-for case, or the statutory articulation of rule or policy is so incomplete that it cannot clearly be said to speak to the situation or issue.

2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, Sec. 45.09 at 29 (4th ed. 1972) The inter-

pretation of Minn. Stat. Sec. 363.01, subd. 18 then, must be made with the foregoing in mind.

The Language of Minn. Stat. Sec. 363.01, subd. 18 (1978)

The respondent argues that the term "business" in the statutory definition refers only to "income or profit producing activities". According to Black's Law Dictionary (5th Ed. 1979), the term business may have a varied meaning from "commercial activity engaged in for gain or livelihood" to "enterprise in which person engaged shows willingness to invest time and capital on future outcome". The complainant has pointed out that the payment of dues by members and the return of leadership training programs by the Jaycees is not unlike the purchase of training courses from a for-profit organization such as Dale Carnegie. The respondent is also engaged in the sale of products to members and the public. Our Minnesota Supreme Court has observed that:

When one speaks of "business" the mind naturally contemplates a commercial or industrial establishment or enterprise. That word, however, may have other and different meanings depending upon the use to which it is put. It is also defined as "that which one has to do or should do; that which one may rightfully or justifiably concern himself or meddle with; . . . that which busies, or engages time, attention, or labor, as a principal serious concern or interest. (Citation omitted)

State v. Lakewood Cemetery, 197 Minn. 501, 267 N.W. 510, 512 (1986)

Where the statute is entitled to a liberal construction, as in this case, other courts have given the term business a comprehensive meaning so as to, for example, classify a church

as a business for workers' compensation purposes. See, *Meyers v. Southwest Reg. Conf. Ass'n. of Seventh Day Adventists*, 230 La. 310, 88 So.2d 381, 384 (1956). Non-profit organizations such as the YMCA have been included within the federal statute despite non-profit status. *Smith v. Young Men's Christian Ass'n.*, 462 F.2d 634, 648 (5th Cir. 1972). Similarly, in *National Organization for Women, Essex Co. Ch. v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318, A.2d 33, 38 (1974), the court stated that, "We discern nothing in the statute or its underlying purposes to persuade us that what would otherwise be a place of public accommodation is any less so because its management and sponsorship is by a nonprofit or membership organization rather than a commercial enterprise" The court decided that the Little League was a public accommodation and was therefore prohibited from excluding girls from its teams. The respondent is a business within these cases and within our definition of "place of public accommodation" which is to be liberally interpreted.

A related question is whether the use of the word "place" in the phrase which is actually defined and the use of the word "facility" in the definition itself serves to limit the scope of the definition to entities with identifiable physical locations so as to exclude the respondent. Although it should be noted that the respondent maintains an office in Chaska, Minnesota and that both the state and local organizations conduct their activities at various "places" within this state, several courts have concluded that public accommodation definitions should not be so limited as urged by the respondent.

In *Little League Baseball, supra*, the court observed that:

The statutory noun "place" (of public accommodation) is a term of convenience; not of limitation. It is employed to reflect the fact that public accommodations are commonly provided at fixed "places" e.g. hotels, restaurants, swimming pools, etc. But a public conveyance, like a train, is a "place" of public accommodation although it has a moving situs. 318 A.2d at 37.

A recent trial court decision issuing a preliminary injunction against the respondent in the District of Columbia also held that the word "place" does not so limit the coverage of the definition. *Bloomfield v. District of Columbia Junior Chamber of Commerce and United States Jaycees*, Civil Act. No. 491-79 (Super.Ct. D.C., filed Sept. 17, 1979). The D.C. Court preliminarily enjoined the U.S. Jaycees from revoking the charter of the local Jaycee chapter or otherwise discriminating in their membership policy on the basis of sex

The commentators also agree that state definitions of a "place of public accommodations" apply to situations where a service is the dominant exchange and the facility is either incidental or non-existent. See, Avins, *What is a Place of "Public" Accommodation?*, 52 Marquette L.Rev. 1, 59 (1968) and *Discrimination in Access to Public Places: A Survey of State and Federal Accommodations Laws*, 7 N.Y.U. Review of Law and Social Change 215, 218 (Spring 1978). Respondent's interpretation might permit a lawn service, a taxi company, or a door-to-door salesman to discriminate. Such an interpretation would obviously not be an accurate reading of this statute and cannot be sustained.

The U.S. Jaycees have suggested that while the Jaycees may be subject to the public accommodations provisions as to their external functions, such as admission to the Patty Berg Golf Classic, the membership practices, which respondent believes should be equated with the ownership of a business corporation, are not subject to the statute. This distinction is without force since the crucial question is whether or not the organization is within the definition of a public accommodation and not private, not whether or not the group which receives the advantages of the organization might be called members or customers. A "private club" which featured nude dancing and sold a "membership" at the door would not thereby avoid our statute. Neither would the membership policies of a food co-operative or a health club.

The respondent seeks to shift the focus of this proceeding to the offering of chapter memberships by the national organization and claims that this "offering" is more selective since applicants to become local chapters must show that they are of good repute and organized for purposes consistent with those of the respondent. Although the offering of charter memberships may be somewhat more selective than the offering of individual memberships, shifting the focus in this manner ignores the reality of the integrated operation of national, state, and local organizations in regard to solicitation of members. It is clear that the solicitation of individual members at the local level is the lifeblood of the Jaycee organization. Realistically, it is respondent's attempt to control and restrict the local chapter's offering of memberships which is the substance of this case, not the nature of respondent's offering of charter memberships.

The Public Nature of the Jaycees

Many of the state statutes prohibiting discrimination in public accommodations provide a specific exemption for clubs or organizations which are "distinctly private". (See, e.g. Ore. Rev. Stat. Sec. 30.675(2)). Likewise, the federal law excepts private clubs. (42 U.S.C. Sec. 2000a(e)) Our statute does not explicitly contain this exception, but it does provide that the goods, services, or advantages offered must be "made available to the public" before an organization is included within the definition.

The United States Jaycees, the Minnesota state organization, and the St. Paul and Minneapolis Chapters are not operated as private organizations and do offer their services and advantages to the public. The record indicates that membership in the Minneapolis and St. Paul Chapters is open to anyone who is between the ages of 18 and 35. There is no screening of prospective members and the local board of directors routinely approve all prospective members submitted. The local officers could recall no instance of a rejection of an application for membership. While the Jaycee program attracts young people involved in business, and particularly those in corporate management, membership is offered to those in all walks of life by means such as door-to-door solicitation for membership. The national and state organizations encourage a diverse membership. The restriction of membership by age group apparently did not make the Boy Scouts a private organization within the meaning of the Oregon statute. *Schenck v. Boy Scouts of America*, 551 P.2d 465, 473 (Ore. 1976). In the *Schenck* case, a girl unsuccessfully sought to join the Cub Scouts and the court concluded that the Boy Scouts did not come within the Oregon definition of "place of public accommoda-

tion". This interpretation, however, was based solely upon the existence of a legislative history which included a discussion of the applicability of the public accommodation provision. As has been discussed, no such history is available in Minnesota. *See also, U.S. v. Slidell Youth Football Ass'n.*, 387 F.Supp. 474, 476 n. 1, 483 (E.D. La. 1974) (football program open to youth age 7 to 13 was place of public accommodation) and *Little League Baseball, supra*.

There can be no doubt that members of genuinely private clubs do have a substantial privacy interest with respect to their membership practices. They obviously would not fall within the definition of a "place of public accommodation". The attributes of a private club have been enumerated by the federal courts and include such items as selectiveness of admission, formal membership procedures, membership control over new members, and substantial dues, none of which would identify the respondent as a private club. *See, Cornelius v. Benevolent Protective Order of the Elks*, 383 F.Supp. 1182 (D.C. Conn. 1974). The *Cornelius* court observed that, "To have their privacy protected, clubs must function as extensions of members homes and not as extensions of their businesses." 382 F.Supp. at 1204.

An examination of the nature of the Jaycee organization, and the two local chapters involved in this case, in particular, discloses that the organizations involved are more of a business than a social nature. The Jaycees were organized as the U.S. Junior Chamber of Commerce and originally had the sole purpose of promoting the business interests of its members. *See, N.Y. City Jaycees, Inc. v. The U.S. Jaycees, Inc.*, 512 F.2d 856, 858 (2nd Cir. 1975). The women who testified in this proceeding (Findings of Fact No. 16 to 18) gave vivid examples of the way that regular membership

and participation at the officer or director level in the Jaycees directly benefited their business career. The record shows that not only have these women benefited generally from the skills that they acquired in the Jaycees, but participation has also led to promotion. One of the women was encouraged to join by her personnel department as a step in her advancement in her company.

To deny this training and help in advancement to women in business while it is fully available to men would place women at a significant competitive disadvantage. Although the respondent would permit women to join as "associate members", this means that they could not vote, could not hold an office such as vice president or director, and could not receive awards. The testimony documents the importance of holding office and receiving awards to both leadership training and career advancement. It would make little sense to guarantee women an equal opportunity in employment while denying them access to activities designed to help in career advancement. As Judge Heany noted in dissent in *Junior Chamber of Commerce of Kansas City v. The Missouri State Junior Chamber of Commerce and the U.S. Jaycees*, 508 F.2d 1031, 1035 (8th Cir. 1975), "The by-laws of the U.S. Jaycees make it clear that they are not merely an organization designed to engage in good works. They are rather an organization primarily designed to train future leaders for civic and business responsibilities."

The legislature has made plain the seriousness with which it views such discrimination by declaring the public policy in this state to be that, "The opportunity to . . . full and equal utilization of public accommodations . . . without such discrimination as is prohibited by this chapter is hereby recognized and declared to be a civil right." Minn. Stat. Sec.

363.12, subd. 2 (1978), and by declaring that, "Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy." Minn. Stat. Sec. 363.12, subd. 1(5) (1978).

While the matter of placing women at a competitive disadvantage in the marketplace is a serious enough form of discrimination, there is perhaps an even more serious concern involved when a person is compelled to accept an inferior or second class status in an organization open to the public because of his or her sex. As the dissent in *Schenck, supra*, pointed out:

The evil at which this type of legislation is aimed is not simply the unfairness which results in denying certain materials to one group when they are at the same time made available to others; it is aimed at the elimination or practices which deprive a person of his individuality by insisting that he bear the stamp of his class. 551 P.2d at 471.

The United States Jaycees are prohibited by our Minnesota Human Rights Act from insisting that women in this state accept a membership status in the Jaycees inferior to that accorded to men.

The respondent has suggested that a ruling in this proceeding will affect other organizations such as the Kiwanis, Lions, or others which have similar by-laws. The short answer to this concern is that the Order in this case necessarily applies only to the respondent. There is, of course, little evidence in the record concerning other organizations which might be similar to the respondent. However, it is conceivable that respondent is unique in certain respects such as: (1) the large number of business people in its membership; (2)

the extent of its leadership training program; (3) its lack of admission requirements; (4) its emphasis on recruitment of new members; (5) its ties to corporations through both sponsorship of members and corporate recognition of the value of Jaycee training; (6) minimal membership control over admissions; (7) its significant current female membership; and (8) its orientation toward civic and business activities as opposed to social activities. Such a determination cannot be made in this case.

G.A.B.

RESPONDENT EXHIBITS

Respondent Exhibit A	Kiwanis International Constitution and Bylaws/As amended to and including June 27, 1978
Respondent Exhibit B	1977 Roster, Kiwanis Club of Minneapolis (Downtown)
Respondent Exhibit C	Association Bylaws/Policies, Standing Rules, Procedures/The Association of Junior Leagues, Inc., September, 1977
Respondent Exhibit D	The International Association of Lions Clubs Constitution and By-Laws/As amended June 24, 1978
Respondent Exhibit E	"Welcome to Minneapolis Rotary"/Rotary Club of Minneapolis
Respondent Exhibit F	Constitution of Rotary International/ Pages 217-221
Respondent Exhibit G	1978-1979 Constitution and Bylaws/ Optimists International
Respondent Exhibit H	Exemption letter from the Internal Revenue Service/March 17, 1964

Respondent Exhibit I	Exemption letter from the Internal Revenue Service/April 29, 1976
Respondent Exhibit J	Certificate of Acceptance and Articles of Acceptance, All Amendments Filed Thereto of The United States Jaycees

COMPLAINANT EXHIBITS

Complainant Exhibit 1	Bylaws and Policy Manual/United States Jaycees
Complainant Exhibit 2	1977-78 Chapter President's Management Handbook/U.S. Jaycees Management Development Series
Complainant Exhibit 3	"For a Richer Life . . . A Better Community . . . /The St. Paul Jaycees
Complainant Exhibit 4	The St. Paul Jaycees '74-'75 Roster
Complainant Exhibit 5	The St. Paul Jaycees 1978-79 Membership Directory
Complainant Exhibit 6	Officers' & Directors' Guide 1978-79/ U.S. Jaycees
Complainant Exhibit 7	(Not Offered.)
Complainant Exhibit 8	(Not Offered.)
Complainant Exhibit 9	(Not Offered.)
Complainant Exhibit 10	Letter/James P. Durbin, VP Membership to Board Member/September 22, 1978
Complainant Exhibit 11	Letter/James P. Durbin, Vice President for Membership to Jaycee/September 22, 1978
Complainant Exhibit 12	Materials used in Corporate Recruitment/ Minneapolis Jaycees
Complainant Exhibit 13	Materials used in Individual Recruitment/ Minneapolis Jaycees
Complainant Exhibit 14	St. Paul Jaycees/Plan of the Year/1978-1979

Complainant Exhibit 15	The 1978-79 United States Jaycees Products-RSVP Catalog
Complainant Exhibit 16	Bylaws of St. Paul Jaycees/Revisions to May 4, 1978
Complainant Exhibit 17	Bylaws of Minneapolis Jaycees, Inc.
Complainant Exhibit 18	Minneapolis Jaycees/Plan of Action/1978-1979
Complainant Exhibit 19	(Not Offered.)
Complainant Exhibit 20	(Not Offered.)
Complainant Exhibit 21A	St. Paul Jaycees/Annual Financial Report for the year ended April 30, 1978
Complainant Exhibit 21B	St. Paul Jaycees/Financial Report/Nine months ended January 31, 1979
Complainant Exhibit 22	Personal Dynamics, Personal Growth Series/The United States Jaycees
Complainant Exhibit 23	Communication Dynamics in the Personal Growth Series of the United States Jaycees
Complainant Exhibit 24	'If Someone Would Only Ask!'/United States Jaycees Recruitment Manual
Complainant Exhibit 25	Future/Official Publication of the United States Jaycees/May, June 1978
Complainant Exhibit 26	Future/Official Publication of the United States Jaycees/November, December 1978
Complainant Exhibit 27	(Not Offered.)
Complainant Exhibit 28	(Not Offered.)
Complainant Exhibit 29	(Not Offered.)
Complainant Exhibit 30	The Gopher Jaycee/Official Publication of the Minnesota Jaycees/January, 1979
Complainant Exhibit 31	(Not Offered.)
Complainant Exhibit 32	(Not Offered.)

Complainant Exhibit 33	The Leadership Letter/Minnesota Jaycees/ January, 1979
Complainant Exhibit 34	(Not Offered.)
Complainant Exhibit 35A	U.S. Jaycees State Monthly Membership Report
Complainant Exhibit 35B	Dues Computation Form/Minnesota Jaycees
Complainant Exhibit 35C	Instructions for Forms/United States Jaycees
Complainant Exhibit 35D	Chapter Bill/U.S. Jaycees to State
Complainant Exhibit 35E	Computer Printout/U.S. Jaycees to State
Complainant Exhibit 35F	New Member Form/U.S. Jaycees to State
Complainant Exhibit 35G	Identification Card/U.S. Jaycees
Complainant Exhibit 36	(Not Offered.)
Complainant Exhibit 37	"The Important Steps to a Well-Managed Jaycee Organization"/U.S. Jaycees
Complainant Exhibit 38	Individual Development Programs/U.S. Jaycees
Complainant Exhibit 39	The Community Development Digest/U.S. Jaycees
Complainant Exhibit 40	Junior Athletic Championships/U.S. Jaycees
Complainant Exhibit 41	Leadership Dynamics/U.S. Jaycees
Complainant Exhibit 42	Leadership Dynamics/Chairman's Guide/ U.S. Jaycees
Complainant Exhibit 43	Committee Chairman's Workbook/U.S. Jaycees
Complainant Exhibit 44	Regional Director's Handbook, 1977-78/ U.S. Jaycees
Complainant Exhibit 45	State President Incentive/March-April/ U.S. Jaycees
Complainant Exhibit 46	The Link to a Stronger Organization/ U.S. Jaycees
Complainant Exhibit 47	Plan of Action/1978-79/Minnesota Jaycees

Complainant Exhibit 48	The Leadership Letter/Minnesota Jaycees/ April, 1979
Complainant Exhibit 49	Blue Chip Requirements/Minnesota Jaycees
Complainant Exhibit 50	Monthly Membership Summary as of March 31, 1979/Minnesota Jaycees
Complainant Exhibit 51	Leadership in Action Workbook/U.S. Jaycees
Complainant Exhibit 52	"There's Something Obvious About You" 1977-78 Officers and Directors Guide/ U.S. Jaycees
Complainant Exhibit 53	Member's Guide to Speak Up/Developed by U.S. Jaycees
Complainant Exhibit 54	Future/Official Publication of the United States Jaycees/March, April, 1979
Complainant Exhibit 55	Future/Official Publication of the United States Jaycees/January, February, 1979
Complainant Exhibit 56	Chapter Billing for April, 1979/U.S. Jaycees
Complainant Exhibit 57	Minneapolis Jaycees Roster/77-78
Complainant Exhibit 58	Minneapolis Jaycees Roster/1978-79
Complainant Exhibit 59	Minneapolis Jaycees Roster/76-77
Complainant Exhibit 60	Minneapolis Jaycees Roster/1975-76
Complainant Exhibit 61	The Leadership Letter/Minnesota Jaycees/ March, 1979
Complainant Exhibit 62	(Not Offered.)
Complainant Exhibit 63	(Not Offered.)
Complainant Exhibit 64	(Not Offered.)
Complainant Exhibit 65	Promotional Mailing/Minnesota Jaycees/ December 28, 1978
Complainant Exhibit 66	Monthly Incentive/May, June/U.S. Jaycees
Complainant Exhibit 67	(Not Offered.)
Complainant Exhibit 68	(Not Offered.)
Complainant Exhibit 69	Mailing to Locals from State/September, 1978

A-128.

Complainant Exhibit 70	Newsletter from U.S. Jaycees to State Officers
Complainant Exhibit 71	September Incentive to Locals from State/ 1978
Complainant Exhibit 72	United States Jaycees Enrollment & Growth Department Monthly Membership Activity Report As of November 30, 1978
Complainant Exhibit 73	United States Jaycees Enrollment & Growth Department Monthly Membership Activity Report As Of October 31, 1978
Complainant Exhibit 74	The Leadership Letter/Minnesota Jaycees January, 1979
Complainant Exhibit 75	(Not Offered.)
Complainant Exhibit 76	Awards Manual/1978-79/U.S. Jaycees
Complainant Exhibit 77	Letter/December 15, 1978/Barry L. Kennedy, President, U.S. Jaycees to D. A. Aberg, President, St. Paul Jaycees, Re: Charter Revocation
Complainant Exhibit 78	Letter/December 15, 1978/Barry L. Kennedy, President, U.S. Jaycees to V. Vavere, President, Minneapolis Jaycees, asking Chapter to appear at hearing re: charter revocation
Complainant Exhibit 78	Partial Membership Roster Printout/ May, 1978
Complainant Exhibit 79	(Not Offered.)
Complainant Exhibit 80	U.S. Jaycees Annual Report/1977-1978
Complainant Exhibit 81	Charge of Discrimination/Sally Pedersen/ December 12, 1978
Complainant Exhibit 82	Charge of Discrimination/Valdis Vavere/ December 12, 1978

- Complainant Exhibit 83 Charge of Discrimination/Michelle Mayer/
December 12, 1978
- Complainant Exhibit 84 Charge of Discrimination/Paul Grisim/
December 12, 1978
- Complainant Exhibit 85 Affidavit of Service of Charges/Roxane M.
Capiz/December 20, 1978, upon Barry R.
Kennedy
- Complainant Exhibit 86 Return Receipt/Certified Letter to Barry R.
Kennedy/No. 432202, December 22, 1978
- Complainant Exhibit 87 Receipt for Certified Mail/Barry R. Kennedy/
December, 1978
- Complainant Exhibit 88A Two-Page Letter/William L. Wilson, Commis-
and 88B sioner, Department of Human Rights to Barry
R. Kennedy/December 19, 1978
- Complainant Exhibit 89 Charge of Discrimination/Daniel Aberg, Briar
Leonard, Georgene Loveless, Kathleen Hawn/
December 12, 1978
- Complainant Exhibit 90A Two-Page Letter/William L. Wilson, Commis-
and 90B sioner, Department of Human Rights to Barry
Kennedy/December 15, 1978
- Complainant Exhibit 91 Affidavit of Service of Charge/Laurel Goff/
December 15, 1978, upon Barry Kennedy
- Complainant Exhibit 92 Return Receipt/Certified Letter/Barry
Kennedy/No. 262579
Receipt for Certified Mail/Barry Kennedy/
No. 262579
- Complainant Exhibit 93 Letter/William L. Wilson, Commissioner,
Department of Human Rights to Barry
Kennedy/January 25, 1979
- Complainant Exhibit 94 Affidavit of Service of Complaint and
Notice of Hearing/Richard L. Varco, Jr./
January 25, 1979

A-130

Complainant Exhibit 95	Return Receipt/Certified Mail/Barry Kennedy/No. 432207 Receipt for Certified Mail/Barry Kennedy/No. 432207
Complainant Exhibit 96	Proposed Resolution of the Saint Paul Area Chamber of Commerce/October 16, 1978
Complainant Exhibit 97	Position Descriptions/U.S. Jaycees
Complainant Exhibit 97	(Not Offered.)
Complainant Exhibit 98	Position Descriptions/U.S. Jaycees
Complainant Exhibit 99	The United States Jaycees Annual Report/1975-1976

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1982

No. 82-1493

THE UNITED STATES JAYCEES,
a non-profit Missouri corporation, on
behalf of itself and its qualified members,
Appellant,

vs.

MARILYN E. McCLURE, Commissioner,
Minnesota Department of Human Rights;
WARREN SPANNAUS, Attorney General of
the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner of
the State of Minnesota,
Appellees.

Appeal from the United States
District Court for the
District of Minnesota

The Court, having considered appellees' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied by an evenly divided court.

The attached dissent by Judge Heaney is joined in by Chief Judge Lay, Judge Bright and Judge McMillian.

August 1, 1983

HEANEY, Circuit Judge—I would grant the petition for rehearing en banc.

The Minnesota Legislature decided that it would take permissible constitutional steps to eliminate discrimination in economic matters because of sex. To this end, it passed Minnesota Statute, Section 363.03(3) (1980), which makes it an unfair discriminatory practice to deny any person the full and equal enjoyment of the services, privileges and advantages of a place of public accommodation because of sex.

The Minnesota Department of Human Rights found that the United States Jaycees was a place of public accommodation within the meaning of the statute. It also found that the Jaycees had discriminated against women by denying them full membership in the organization. The Minnesota Supreme Court reached a similar conclusion. In so doing the Court noted that the Jaycees is a business organization whose primary aim is to advance the business careers of its members.

We should accept the public policy decision of the Minnesota Legislature and the holding of the Minnesota Supreme Court. Both are fully supported by the record.

Young women are entitled to share in the good jobs in our society according to their abilities. They will not share fully in these jobs, however, as long as young men are exclusively eligible for membership in the "right business organization," which gives them an edge in hiring for and promotion to leadership positions. To be sure, the Jaycees sponsor many social activities and events. They also take positions on some of the great issues of our time. But these activities are not central to their purpose. The central purpose is rather to learn the techniques and skills and to form the acquaintances that will serve as a basis for leadership positions today and tomorrow.

Young men have the right to associate with whomever they please, but under Minnesota law they should not be able to form an organization that is primarily business oriented and exclude young women from that organization when the effect of that exclusion is to deprive the latter of an equal opportunity for leadership positions.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1493

THE UNITED STATES JAYCEES,
a non-profit Missouri corporation, on
behalf of itself and its qualified members,
Appellant,

vs.

MARILYN E. McCLURE, Commissioner,
Minnesota Department of Human Rights;
WARREN SPANNAUS, Attorney General of
the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner of
the State of Minnesota,
Appellees.

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that Irene Gomez-Bethke, and Hubert H. Humphrey, III, successors in office to Marilyn E. McClure and Warren Spannaus, respectively, together with George A. Beck, appellees above-named, hereby appeal to the Supreme Court of the United States from the judgment entered in this action on June 7, 1983. This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: October 7, 1983.

HUBERT H. HUMPHREY, III

Attorney General

State of Minnesota

By: KENT G. HARBISON

Chief Deputy Attorney General

Counsel of Record

102 State Capitol Building

St. Paul, Minnesota 55155

Telephone: (612) 296-2351

RICHARD L. VARCO, JR.

Special Assistant

Attorney General

1100 Bremer Tower

7th Place and Minnesota Street

St. Paul, Minnesota 55101

Telephone: (612) 296-7862

Attorneys for Appellees

**Filed
Oct. 11, 1983
Robert D. St. Vrain
Clerk**

FEB 27 1984

ALEXANDER L. STEVAS
CLERK

No. 83-724

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

KATHRYN R. ROBERTS, Acting Commissioner
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY, III, Attorney General
of the State of Minnesota; and GEORGE A. BECK,
Hearing Examiner of the State of Minnesota,
Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of itself and its
qualified members,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

CARL D. HALL, JR.
Counsel of Record
6935 South Delaware Place
Tulsa, Oklahoma 74136
Telephone: (918) 492-6600
CLAY R. MOORE and
MACKALL CROUNSE &
MOORE
1600 TCF Tower
Minneapolis, MN 55402
Counsel for Appellee

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
KENT G. HARBISON
Counsel of Record
Chief Deputy
Attorney General
102 State Capitol Bldg.
St. Paul, MN 55155
Telephone: (612) 296-2351
Counsel for Appellants
Of Counsel:
RICHARD L. VARCO, JR.
Special Assistant
Attorney General
State of Minnesota

APPEAL DOCKETED OCTOBER 31, 1983
PROBABLE JURISDICTION NOTED JANUARY 9, 1984

INDEX

	Page
Chronological list of relevant docket entries	JA-2
Plaintiff's complaint, filed October 31, 1979	JA-3
Defendants' joint answer, filed November 29, 1979	JA-25
Stipulation regarding certification of state law issued to Minnesota Supreme Court, dated March 24, 1980	JA-28
Certification of state law issue to Minnesota Supreme Court (Murphy, J.), dated March 24, 1980 ..	JA-32

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed jurisdictional statement:

	Page
Findings of fact, conclusions of law, order, exhibit list, and memorandum of hearing examiner George A. Beck of the Minnesota Office of Hearing Examiners, dated October 9, 1979	A-93
Opinion of the Minnesota Supreme Court, dated May 8, 1981	A-69
Memorandum opinion and order for judgment of the United States District Court for the District of Minnesota, dated March 25, 1982	A-52
Opinion of the United States Court of Appeals for the Eighth Circuit, dated June 7, 1983	A-1
Order of the United States Court of Appeals for the Eighth Circuit denying petition for rehearing and suggestion for rehearing <i>en banc</i> , dated August 1, 1983	A-131

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

No. 83-724

KATHRYN R. ROBERTS, Acting Commissioner
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY, III, Attorney General
of the State of Minnesota; and GEORGE A. BECK,
Hearing Examiner of the State of Minnesota,
Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of itself and its
qualified members,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES

October 31, 1979—plaintiff's complaint filed in U. S. District Court for the District of Minnesota.

November 29, 1964—joint answer of defendants filed.

March 24, 1980—stipulation regarding certification of state law issue in the Minnesota Supreme Court and certification of state law issue to Minnesota Supreme Court filed.

May 28, 1981—Syllabus, opinion, and mandate from the Minnesota Supreme Court answering certified question in the affirmative returned to district court.

August 3, 1981—district court trial commenced.

March 25, 1982—judgment of the district court in favor of defendants and against plaintiff entered.

April 20, 1982—plaintiff's notice of appeal filed.

June 7, 1983—opinion and judgment of the Court of Appeals for the Eighth Circuit filed.

June 23, 1983—appellees' petition for rehearing and suggestion that rehearing being *en banc* filed (affidavit of service by mail on June 21, 1983 omitted in printing).

August 1, 1983—order denying petition for rehearing and suggestion for rehearing *en banc* filed.

October 11, 1983—notice of appeal to the Supreme Court of the United States filed.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civ. 4-79-530

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of itself and its
qualified members,

Plaintiff,

vs.

MARILYN E. McCCLURE, Commissioner, Minnesota
Department of Human Rights, WARREN SPANNAUS,
Attorney General of the State of Minnesota, and
GEORGE A. BECK, Hearing Examiner of the
State of Minnesota,

Defendants.

COMPLAINT

For its complaint, the plaintiff United States Jaycees alleges as follows:

I.

JURISDICTION

(A) This is an action in which the plaintiff United States Jaycees seeks redress for the threatened deprivation of, rights, privileges and immunities secured by the Constitution of the United States. The acts of the defendants complained of herein were and are being committed under color of state law within the meaning of Title 42, U.S.C. Section 1983, and constitute state action within the meaning of the 14th amendment to the Constitution of the United States.

(B) Jurisdiction of this Court is conferred by Title 28, U.S.C. Section 1343 and Title 42, U.S.C. Section 1983; jurisdiction is also conferred upon this Court by Title 28, U.S.C. Section 1331, there being substantial federal questions asserted, and by Title 28, U.S.C. Section 1332, there being the requisite diversity of citizenship and the matter in controversy being of the value of \$10,000 or more exclusive of costs and interest.

II.

PARTIES

(A) The plaintiff United States Jaycees is a non-profit corporation organized under the laws of the State of Missouri with its principal place of business in Tulsa, Oklahoma. The plaintiff is a membership organization in which there are several classes of membership, including state chapters known as State Organization Members and local chapters known as Local Organization Members and Individual Members which are defined generally in the plaintiff's By-Laws as young men between the ages of 18 and 35. Qualified Local Organization Members are those chapters whose voting members and officers and directors are young men between the ages of 18 and 35.

This action, and the state proceedings referred to herein, arises out of the fact that, by the terms of the By-Laws of the plaintiff United States Jaycees, women are not eligible to be Individual Members of the United States Jaycees nor may a local chapter qualify as a Local Organization Member if said chapter permits women to act as voting members or officers or directors thereof.

(B) The defendant Marilyn E. McClure is the Commissioner of the Department of Human Rights of the State of Minnesota and, in such capacity, is the successor to William

L. Wilson who, as the immediately prior Commissioner, instituted the state proceedings referred to herein pursuant to Minnesota Statutes, Chapter 363.

(C) The defendant Warren Spannaus is the Attorney General of the State of Minnesota. In his official capacity, and pursuant to the provisions of state law, he has collaborated with the previous Commissioner Wilson and defendant McClure in the institution of the state proceedings referred to herein.

(D) The defendant George A. Beck is a State Hearing Examiner assigned to the state proceedings described herein and is the official of the State of Minnesota issuing the Order of October 9, 1979, complained of herein.

III.

STATE PROCEEDINGS

(A) On or about January 25, 1979, the prior Commissioner Wilson, represented by the defendant Spannaus, issued and served a complaint upon the plaintiff United States Jaycees pursuant to Minn. Stat. §363.06 Subd. 4(2) in which Wilson claimed that the United States Jaycees, the Minnesota Jaycees, the Minneapolis Jaycees, and the St. Paul Jaycees were "places of public accommodation" within the meaning of Minn. Stat. §363.01 Subdivision 18 and that the United States Jaycees had threatened to expel the Minneapolis Jaycees and the St. Paul Jaycees as Local Organization Members because said local chapters had permitted women to serve as officers and directors of those local organizations. This threatened action, it was alleged, violated the provisions of Minn. Stat. §363.03, Subdivisions 3, 6 and 7, which prohibit discrimination by reason of sex in "places of public accommodation" as defined in §363.01 Subdivision 18. Said Complaint is attached hereto as Exhibit A.

(B) On or before March 1, 1979, the United States Jaycees filed and served its answer to the aforesaid complaint in which, *inter alia*, it denied the application of the definition of a "place of public accommodation" as set forth in Minn. Stat. §363.01 Subdivision 18, and the enforceability of Minn. Stat. §363.03 Subdivisions 3, 6 and 7 against the United States Jaycees.

(C) Said answer, attached hereto as Exhibit B, further specifically reserved for determination by the United States District Court, the federal Constitutional objections asserted in this complaint to the enforceability of Minn. Stat. §363.03 Subdivisions 3, 6 and 7 against the United States Jaycees. This reservation was made in accordance with the procedure and authority of *England vs. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 11 L.Ed.2d 440, 84 S.Ct. 461 (1964).

(D) Said state proceeding came to hearing before State Hearing Examiner George A. Beck on April 23-24, 1979, pursuant to Chapter 363, Minnesota Statutes, at which time the parties presented their evidence and testimony. After submission of briefs, the record in that proceeding was closed on September 11, 1979.

(E) On October 9, 1979, Examiner Beck issued his Findings of Fact, Conclusions of Law and Order (attached as Exhibit C hereto)* in said proceedings which, by reason of Minn. Stat. §363.071, Subd. 2, is administratively final and effective for all purposes subject only to review by the district court of the State of Minnesota and subject further to a stay thereof pending such review, if said stay should be granted by the state court.

* This document is found at page 93 in the Appendix to the printed Jurisdictional Statement and is therefore deleted from this Appendix.

(F) Said Order of Examiner Beck enjoined plaintiff The United States Jaycees and ordered plaintiff to cease and desist from, in substance, (1) revoking the charter of any Jaycee local organization member or state organization member which extends to women full membership privileges and (2) from otherwise discriminating against any individual member or applicant for membership in the Jaycees, all as more particularly set forth in Examiner Beck's Order of October 9, 1979.

(G) Proceedings for review of said Order will be commenced pursuant to Minnesota Statute §15.0424 in the courts of the State of Minnesota on or before November 8, 1979, but, by reason of state law, the injunction and cease and desist order of October 9, 1979 is presently effective and operates to deprive the plaintiff The United States Jaycees of the constitutional rights asserted hereinbelow and will continue to do so unless and until the courts of Minnesota either stay or reverse and vacate said order.

IV.

CLAIMS FOR RELIEF

(A) The plaintiff realleges Parts I, II and III hereof in their entirety.

(B) The enforcement of Minn. Stat. §363.03 Subdivisions 3, 6 and 7 against the plaintiff United States Jaycees is being conducted under color of state law within the meaning of Title 42, United States Code, Section 1983 and constitutes state action within the meaning of the Fourteenth Amendment to the Constitution of the United States.

(C) The enforcement of said Minnesota Statutes and the Order of Examiner Beck of October 9, 1979 against the United States Jaycees threatens to deprive, and does deprive, the United States Jaycees of rights, privileges and immunities

guaranteed by the Constitution of the United States in the following respects:

(1) *Deprivation of the Right
of Freedom of Association*

By her complaint in the state proceeding described herein, and by his Order of October 9, 1979, the defendants McClure and Beck, with the assistance of defendant Spannaus, seek to effectively deprive the plaintiff The United States Jaycees and its members from determining the composition of its membership and its ownership on such terms as they see fit. By so doing, the defendants seek to deprive, and have deprived, the plaintiff The United States Jaycees and its members of the right of freedom of association and the cognate right of freedom not to associate guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

(2) *Void for Vagueness*

The enforceability of said Minnesota Statutes against the plaintiff in the manner sought by the defendants in the pending state proceedings depends upon whether the United States Jaycees or its local chapters in Minnesota are "places of public accommodation" within the meaning of Minn. Stat. §363.01 Subd. 18 which reads:

"18. *Public Accommodations.* 'Place of public accommodation' means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public."

Said definition clearly encompasses such things as restaurants, bars, hotels, movies and bus lines, but con-

tains no language which a person of ordinary intelligence would rationally construe to include the United States Jaycees and like organizations. In particular, the United States Jaycees or its local chapters cannot be reasonably held to be a "business, accommodation, refreshment, entertainment, recreation, or transportation *facility* * * " given the ordinary meaning of that language.

If, however, by the process of statutory construction in the pending state proceedings, the ordinary meaning of said definition is extended to include the plaintiff, said definition becomes constitutionally defective in that it fails to provide adequate notice to the United States Jaycees and like organizations that they are or are not within the class of entities which are subject to the requirements of Minn. Stat. §363.03 Subds. 3, 6 and 7. Moreover, said statutes, if so interpreted, fail to adequately circumscribe the powers and duties of the defendants and others charged with enforcement thereby threatening to expose organizations such as the plaintiff to the individual whim and caprice of those state officials. Said statutes, if so interpreted, threaten furthermore to produce arbitrary and capricious enforcement against some organizations like the plaintiff but not against others similarly constituted and thereby to violate the Equal Protection Clause of the Fourteenth Amendment.

In the light of the potentially punitive and criminal consequences of a violation of Minn. Stat. §363.03 Subds. 3, 6 and 7, and in the light of the fact that the enforcement thereof as to plaintiff threatens to infringe upon the constitutional right of freedom of association, said statutes, if so interpreted by the appropriate tribunals and courts of the State of Minnesota, are void, both

facially and as applied to this plaintiff, as violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(D) A controversy exists within the meaning of Title 28, U.S.C. Section 2201 et seq. and the plaintiff United States Jaycees is entitled to a judgment declaring that the aforementioned Minnesota Statutes may not be constitutionally enforced against the plaintiff by the defendants and, in addition, is entitled to injunctive relief restraining and adjoining the defendants from so attempting to enforce those statutes in the circumstances presented herein.

V.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff United States Jaycees, on behalf of itself and its qualified members, prays:

(1) That a judgment be rendered declaring that Minnesota Statutes Section 363.01 Subdivision 18 and Section 363.03 Subdivisions 3, 6 and 7 are, both facially and as applied to the United States Jaycees under the circumstances presented herein, void, invalid and unenforceable as violative of the Constitution of the United States, enforcing and attempting to enforce Minn. Stat. §363.03, Subdivisions 3, 6 and 7 against the United States Jaycees.

(2) That the Court abstain, however, from a determination of the merits of the Federal Constitutional issues asserted herein until the state proceedings described herein have been concluded by final judgment.

(3) If by final judgment, the appropriate tribunals and courts of the State of Minnesota, interpret Minn. Stat. 363.01 Subdivision 18 and Minn. Stat. §363.03 Subdivisions 3, 6 and 7 to apply to the plaintiff United States Jaycees, and if the relief sought by the defendant Commissioner in said

state proceedings is granted in whole or in part, then the plaintiff prays that a permanent injunction issue restraining and enjoining the defendants, their successors in office, and their agents and representatives from the enforcement or attempted enforcement of said Minnesota Statutes or any such judgment rendered in said state proceedings.

(4) That the Court issue and decree such other relief as it may deem appropriate in the circumstances and award such costs, attorneys fees and damages as may be proven and allowable herein.

Dated: October 29, 1979.

**MACKALL, CROUNSE &
MOORE**

By: CLAY R. MOORE

And

By: FRANK A. DVORAK

Attorneys for the Plaintiff

The United States Jaycees

100 First National Bank

Building

Minneapolis, Minnesota 55402

Telephone: (612) 333-1341

Of Counsel:

CARL D. HALL, JR.

HALL, SUBLETT, McCORMICK

& ANDREW

1776 One Williams Center

Tulsa, Oklahoma 74103

Telephone: (918) 582-8815

EXHIBIT "A"

BEFORE THE HUMAN RIGHTS DEPARTMENT
OF THE STATE OF MINNESOTA

STATE OF MINNESOTA, by
WILLIAM L. WILSON, Commissioner,
Department of Human Rights,
Complainant,
vs.
THE UNITED STATES JAYCEES,
Respondent.

COMPLAINT

The State of Minnesota, by William L. Wilson, Commissioner, Minnesota Department of Human Rights alleges that:

1. This complaint is issued pursuant to Minn. Stat. § 363.06 (1978) and HumRts 107(e).
2. The Hearing Examiner has jurisdiction of this matter pursuant to Minn. Stat. §§ 363.071 and 15.052 (1978).
3. Respondent United States Jaycees ("U. S. Jaycees") is a Missouri corporation and has its principal place of business in Tulsa, Oklahoma. It is organized, *inter alia*, in order to encourage and develop the formation of young men's civic organizations throughout the United States.
4. Classes of membership in the U. S. Jaycees include that of State Organization Member, Local Organization Member, ("Jaycee chapter"), and Individual Member. Females are prohibited from becoming Individual Members of the U. S. Jaycees. Any young men's organization of good repute existing in the United States, which is organized for purposes similar to and consistent with U. S. Jaycee by-laws and whose

officers are young men between the ages of 18 and 35 is eligible for affiliation with the U. S. Jaycees as a Jaycee chapter. At all times relevant herein the U. S. Jaycees has been and continue to be engaged in efforts to increase the size and numbers of Jaycee chapters throughout Minnesota.

5. The Minneapolis and St. Paul Jaycees are local Jaycee chapters. The Minnesota Jaycees is affiliated with the U.S. Jaycees as a State Organization Member. Male members of Jaycee chapters in Minnesota are affiliated with the U. S. Jaycees through their local chapters.

6. At all times relevant herein membership in the Minneapolis and St. Paul Jaycees has been obtainable by any individual between the ages of 18-35 upon the filing of a written application and payment of the required annual dues. At all times relevant herein, the Minneapolis and St. Paul chapters have transmitted a portion of each of its members dues to the U. S. Jaycees.

7. Affiliation with the U. S. Jaycees permits Jaycee chapters to use the Jaycee name and gives them access to the good will which has been built up around the Jaycee name, information and guidance from the U. S. Jaycees regarding the presentation of civic programs, advice from the U. S. Jaycees regarding the solicitation and retention of members, and the opportunity to participate in state and national Jaycee meetings and elections. Affiliation with the U. S. Jaycees is conditioned upon compliance with U. S. Jaycee by-laws.

8. The U. S., Minnesota, St. Paul and Minneapolis Jaycees are public accommodations within the meaning of Minn. Stat. § 363.01 subd. 18 (1978).

9. The Minneapolis and St. Paul Jaycees, contrary to U. S. Jaycee by-laws, allow female members to serve as officers

and directors of the respective chapters. As a result of this conduct, the U. S. Jaycees has denied the Minneapolis and St. Paul Jaycees membership privileges accorded them pursuant to U. S. Jaycee by-laws.

10. On or about December 15, 1978, the U. S. Jaycees informed the Minneapolis and St. Paul Jaycees that on January 19, 1979, a motion would be made at the U. S. Jaycee Executive Board of Directors meeting to revoke their respective charters. At that time, the Minneapolis and St. Paul Jaycees were also informed that the above mentioned revocation procedure would be halted upon a showing that no female member was an officer or director of their chapter.

11. The U. S. Jaycees have thereby committed unfair discriminatory practices in violation of Minn. Stat. § 363.03 subd. 3 (6) and (7) (1978).

12. On or about December 14, 1978, members of the St. Paul Jaycees filed a charge of discrimination against the respondent with the Department. That charge was served on respondent on December 15, 1978.

13. On or about December 19, 1978, members of the Minneapolis Jaycees filed a charge of discrimination against respondent with the Department. That charge was served on respondent on December 20, 1978.

14. The Department conducted an investigation of the allegations in the above mentioned charges.

15. On or about January 9, 1979, complainant found probable cause to believe that respondent had committed unfair discriminatory practices.

WHEREFORE, complainant prays that the Hearing Examiner issue an order enjoining respondent from:

1. Discriminating against any member or future member of any Jaycee chapter in Minnesota on the basis of sex with respect to the terms, conditions, or privileges of membership in the United States Jaycees or the Minnesota Jaycees or its local Jaycee chapters.

2. Revoking the charter, denying any privilege or right of membership, or otherwise discriminating in any manner against any Minnesota Jaycee chapter or against the Minnesota Jaycees on the basis that either accords or has accorded female members all of the rights and privileges of membership that are accorded male members.

3. Such other relief as the Examiner believes to be just and proper.

Dated: January 25, 1979

WILLIAM L. WILSON

Commissioner

Department of Human Rights

WARREN SPANNAUS

Attorney General

State of Minnesota

By: RICHARD L. VARCO, JR.

Special Assistant

Attorney General

240 Bremer Building

St. Paul, MN 55101

(612) 296-7862

Attorneys for Complainant

BEFORE THE HUMAN RIGHTS DEPARTMENT
OF THE STATE OF MINNESOTA

STATE OF MINNESOTA, by
WILLIAM L. WILSON, COMMISSIONER,
Department of Human Rights,

Complainant,

vs.

THE UNITED STATES JAYCEES,

Respondent.

NOTICE AND ORDER FOR HEARING
TO THE ABOVE-NAMED RESPONDENT:

Please take notice that, pursuant to Minn. Stat. § 363.06 subd. 4(a) (1978), William L. Wilson, Commissioner, Department of Human Rights (hereinafter "complainant"), hereby orders that a hearing be held on the allegations contained in the complaint issued in the above-entitled matter. Said hearing will be held on April 23 and 24, 1979, at nine o'clock in the forenoon, at 240 Bremer Building, Seventh and Robert Streets, St. Paul, Minnesota 55101. George Beck, Office of Hearing Examiners, 1745 University Avenue, Room 300, St. Paul, Minnesota 55104, Telephone (612) 296-8108, will serve as Hearing Examiner. You may retain legal counsel for this proceeding.

The hearing will be conducted in accordance with HumRts 101-124 and 9 MCAR § 2.201-2.222, copies of which may be obtained from the Documents Section of the Department of Administration. You are required by HumRts 108 to serve an answer upon the Hearing Examiner and complainant's attorney within 20 days after service of the complaint upon you. If you intend to appear at the hearing, you are further required by 9 MCAR § 2.205 to file a Notice of Appearance with the Hearing Examiner within 20 days after service of

the Notice and Order for Hearing. Failure to answer the complaint or to appear at the hearing shall be deemed an admission of the allegations of the complaint.

If you wish to discuss informal disposition or discovery, you may contact complainant's attorney.

Dated: January 25, 1979

WILLIAM L. WILSON
Commissioner
Department of Human Rights

EXHIBIT "B"

BEFORE THE HUMAN RIGHTS DEPARTMENT
OF THE STATE OF MINNESOTA

STATE OF MINNESOTA, by
WILLIAM L. WILSON, Commissioner,
Department of Human Rights,
Complainant,
vs.
THE UNITED STATES JAYCEES,
Respondent.

ANSWER OF RESPONDENT
THE UNITED STATES JAYCEES

For its answer to the Complaint, the respondent United States Jaycees, pleads and alleges as follows:

I.

Unless specifically admitted or otherwise responded to herein, all allegations of the Complaint are denied and the complainant Commissioner is put to his strict proof thereof.

II.

As to paragraph 1 of the Complaint, respondent admits that the Complaint is purportedly issued pursuant to Minn.

Stat. §363.06. Respondent denies, however, that the Complaint is issued pursuant to regulation HumRts 107(e), there being no allegations in the Complaint which bring this proceeding within the provisions of HumRts 107(e). The respondent further denies that the requirements for certification of this proceeding under HumRts 107(e) are present and alleges that the nature of this proceeding, the substantive issues raised and the nature of the relief sought render a certification of this proceeding under HumRts 107(e) wholly unnecessary and unreasonably cumbersome.

III.

As to paragraph 2 of the Complaint, respondent admits, pursuant to Minn. Stat. §363.071 and Minn. Stat. §15.052, all hearings in this matter other than those in connection with judicial review are required to be held before a hearing examiner assigned by the State Office of Hearing Examiners. Respondent denies however that the Hearing Examiner or any other agency or court of the State of Minnesota has personal jurisdiction of the respondent, The United States Jaycees.

IV.

As to paragraph 3 of the Complaint, respondent alleges that it is a non-profit corporation, organized under the laws of the State of Missouri, with its principal place of business in Tulsa, Oklahoma. The corporate purpose of the respondent, The United States Jaycees is stated in Article 2A of its By-Laws to-wit:

"2A. This Corporation shall be a non-profit Corporation, organized for such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism

and civic interest, and as a supplementary educational institute to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and true understanding among young men of all nations".

V.

Respondent admits the allegations of paragraph 4 but alleges that the classes of membership in the respondent include State Organization Member, Local Organization Member, Individual Member, Associate Individual Member, Honorary Member, Life Member, and Sustaining Member, and that the definitions and requirements for each of which are set forth in Article 4 of the respondent's By-Laws.

Respondent further alleges that women are not eligible to be Individual Members of the respondent but are eligible to be Associate Individual Members as defined in Article 4 of respondent's By-Laws. Associate Individual Members of the respondent may and do participate in all activities of the respondent except that, by reason of Article 4-3 of the respondent's By-Laws, an Associate Individual Member may not vote nor act as an officer or director of the respondent United States Jaycees, nor of any qualified State Organization Member or qualified Local Organization Member.

VI.

As to paragraph 5 of the Complaint, the respondent alleges that the Minneapolis Jaycees and the St. Paul Jaycees have been Local Organization Members of the respondent and the Minnesota Jaycees has been a State Organization Member. The respondent denies that said Minneapolis Jaycees and St. Paul Jaycees are presently qualified as Local Organization Members.

Qualified male members of qualified Local Organization Members in Minnesota are, by virtue of such membership, Individual Members of the respondent United States Jaycees.

VII.

As to paragraph 6 of the Complaint, the respondent alleges upon information and belief that the Minneapolis Jaycees and the St. Paul Jaycees have permitted women to be voting members and to serve as officers and directors in their respective organizations. In so doing, the Minneapolis Jaycees and St. Paul Jaycees have disqualified themselves as Local Organization Members of the respondent by reason of By-Law 4-4 of the respondent's By-Laws which, among other restrictions, restricts membership of a Local Organization to those Local Organizations whose voting members, officers and directors are young men.

Respondent denies that the Minneapolis Jaycees and the St. Paul Jaycees have transmitted a portion of their members' dues to the United States Jaycees and affirmatively alleges that only the Minnesota Jaycees, the State Organization Member, has transmitted any portion of its dues to the United States Jaycees.

VIII.

Respondent admits the general substance of the allegations of paragraph 7 of the Complaint but alleges that the rights, benefits, privileges and obligations of "affiliation" or membership in the respondent United States Jaycees are more fully set forth in the By-Laws and Policy Manual of the respondent and will be more accurately and completely stated in the evidence to be presented by respondent.

IX.

Respondent denies paragraph 8 of the Complaint in its entirety and alleges further:

(A) The respondent United States Jaycees, the Minnesota Jaycees and the Minneapolis and St. Paul Jaycees are not places of public accommodation within the meaning of Minn. Stat. §363.01 Subdivision 18, i.e., they are not, collectively or singularly, a "business, accommodation, refreshment, entertainment, recreation or transportation facility" nor do they or any of them extend, offer, sell or otherwise make available to the public "goods, services, facilities, advantages or accommodations" within the meaning of §363.01 Subdivision 18.

(B) The Minnesota Jaycees are not herein represented or complained against, nor has said organization filed a complaint against the respondent. The status of said Minnesota Jaycees under Minn. Stat. §363.03 Subdivision 3, 6 and 7, is therefore irrelevant and the complainant has no standing to assert any claim relating to the Minnesota Jaycees.

(C) The Minneapolis Jaycees and the St. Paul Jaycees are each private organizations which have previously sought admission and have been accepted as Local Organization Members of the respondent United States Jaycees and, in so doing, have voluntarily and without compulsion agreed to be bound, as a condition of their continued membership, by the By-Laws of the respondent. Said organizations have no lawful right to be members of the respondent, United States Jaycees or to continue as members of the respondent except and unless they conform to those conditions of membership as set forth in respondent's By-Laws and such other restrictions as may be imposed thereby. Each of said organizations has been and is now free to establish their own conditions of membership, select their own officers and directors, and to pursue such objectives as they see fit provided only that they may not do so under the name "Jaycees" (or any other protected mark owned by respondent) or as members of the

United States Jaycees unless they conform to the By-Laws of respondent and are and remain consistent in all things with purposes and objectives of the respondent.

X.

As to paragraph 9 of the Complaint, respondent admits that the Minneapolis Jaycees and the St. Paul Jaycees have ostensibly permitted certain women to serve as officers and directors of their respective organizations and that, as a result, the respondent has advised such chapters that they are subject to expulsion from membership in the United States Jaycees. Respondent denies that such chapters have been denied membership privileges accorded pursuant to United States Jaycees By-Laws but, on the contrary, the respondent has provided, and will continue to provide, said chapters full membership privileges pursuant to said By-Laws provided only that said chapters, in consideration, comply with the same By-Laws.

XI.

Respondent admits paragraphs 10, 12 and 13 of the Complaint.

XII.

Respondent denies paragraph 11 of the Complaint.

XIII.

As to paragraph 14 of the Complaint, the respondent is unaware of the nature, extent, thoroughness and objectivity of any alleged investigations by the Department and is therefore unable to confirm or deny that any investigation was conducted which conformed to the requirements and intention of Minn. Stat. §363.06 Subd. 4.

XIV.

As to paragraph 15 of the Complaint, the respondent admits that a finding of probable cause was ostensibly rendered by the complainant Commissioner, but respondent is unable to

confirm or deny that said finding was rendered after a full and reasoned judgment by the complainant consistent with the requirements and intention of Minn. Stat. §363.06 Subd. 4.

XV.

RESERVATION OF FEDERAL
CONSTITUTIONAL CLAIMS

(A) Respondent hereby specifically reserves for determination by the United States District Court for the District of Minnesota, in an action to be commenced by respondent in said court, all federal constitutional claims challenging the validity of the Minnesota statutes invoked in these proceedings and the application of said statutes to the respondent under the circumstances presented herein. This reservation is made under the authority of *England vs. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 11 L.Ed.2d 440, 84 S.Ct. 461. If, for any reason, these constitutional challenges are unable to be fully litigated in the United States District Court, the respondent further reserves the right to assert said claims in these proceedings and in any proceeding involving judicial review hereof in the state courts of Minnesota.

(B) The federal constitutional challenges so reserved include, but are not limited to, the following:

1) Minn. Stat. §363.01 Subdivision 18 and Minn. Stat. §363.03 Subdivision 3, 6, 7, are, both facially and as applied to this respondent, void and invalid in that, contrary to the Fourteenth Amendment to the Constitution of the United States, Minn. Stat. §363.01 Subdivision 18 fails to provide a definition of "place of public accommodation" which is sufficiently precise so as to place any person or organization or the respondent on notice that they are or are not within the scope of said definition or that they are or are not subject to the potentially punitive and criminal consequences of a violation of §363.03 Subdivisions 3, 6 and 7.

2) Minn. Stat. §363.01 Subdivision 18 and §363.03 Subdivisions 3, 6 and 7 are violative of the First and Fourteenth Amendments to the Constitution of the United States in that said statutes and the application of said statutes to the respondent in the manner sought in this proceeding, deprives the respondent and its qualified members of the right of freedom of association.

(C) The purpose of this reservation is to secure to respondent the right to vindicate its federal constitutional rights in the United States District Court and to expose said claims herein solely for the purpose of permitting the appropriate tribunals of the State of Minnesota to interpret the Minnesota statutes involved in the light of the constitutional claims so reserved.

WHEREFORE, respondent prays that complainant take nothing by his complaint and that the same be dismissed.

Dated: February 26, 1979.

**MACKALL, CROUNSE &
MOORE**

By: **CLAY R. MOORE**

And

FRANK A. DVORAK

**1000 First National Bank
Building**

Minneapolis, Minnesota 55402

612/333-1341

**Attorneys for Respondent
United States Jaycees**

Of Counsel:

CARL D. HALL, JR.

and

**HALL, SUBLETT, McCORMICK
& ANDREWS**

1776 Williams Center

Tulsa, Oklahoma 74103

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil Action File No. 4-79-530

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of itself and its
qualified members,

Plaintiff,

vs.

MARILYN E. McCLURE, Commissioner,
Minnesota Department of Human Rights,
WARREN SPANNAUS, Attorney General of the State of
Minnesota, and GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Defendants.

JOINT ANSWER

Defendants for their answer to plaintiff's complaint herein
admit, deny, and allege as follows:

1. As to paragraphs I(A) and (B) admit that the actions
of defendants complained of in this matter were and are being
committed under color of state law within the meaning of
Title 42, U.S.C. Section 1983 and deny the remaining allega-
tions.

2. Admit the allegations in paragraphs II(A), (B), (C),
and (D) but deny that Warren Spannaus collaborated with
William L. Wilson and Marilyn E. McClure in the institution
of the state proceedings referred to in the complaint.

3. As to paragraphs III(A), (B), (C), and (F), to the
extent that they quote from, paraphrase, or interpret the

provisions of Minnesota statutes; the complaint issued by William L. Wilson and served upon plaintiff on or about January 25, 1975; plaintiff's answer to that complaint; the findings of fact, conclusions of law, and order of defendant Beck, issued on October 9, 1979; or *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), defendants refer the court to the texts thereof.

4. Admit the allegations in paragraph III(D).

5. Deny the allegations in paragraph III(E).

6. As to paragraph III(G), admit that by reason of state law, the injunction and cease and desist order of October 9, 1979, is presently effective and that proceedings for review of that order were commenced in the courts of the State of Minnesota prior to November 8, 1979, but deny the remaining allegations.

7. Inasmuch as paragraph IV(A) is a repetition of allegations pleaded elsewhere in the complaint, defendants repeat the respective answers, admissions, and denials originally pleaded to those allegations.

8. As to paragraph IV(B), admit that the enforcement of Minn. Stat. § 363.03 Subdivisions 3, 6 and 7 against the plaintiff United States Jaycees is being conducted under color of state law within the meaning of Title 42, United States Code, Section 1983 but deny that this enforcement constitutes state action within the meaning of the Fourteenth Amendment to the Constitution of the United States.

9. As to paragraphs IV(C) and IV(C)(1) and (2) admit that the enforcement of Minn. Stat. § 363.03 Subdivisions 3, 6 and 7 against plaintiff in the manner sought by defendants McClure and Spannaus in the pending state proceedings depends in part on whether the United States Jaycees or its local chapters in Minnesota are "places of public accommoda-

tion" within the meaning of Minn. Stat. § 363.01 Subd. 18 and deny the remaining allegations.

10. Deny the allegations in paragraph IV(D).

11. Except as expressly admitted, denied, or otherwise qualified above, deny each allegation, matter, fact and thing of the complaint.

SEPARATE DEFENSES

12. The complaint fails to state a claim upon which relief can be granted.

13. The court lacks jurisdiction over the subject matter of the complaint.

14. Plaintiff has failed to exhaust its state judicial remedies.

WHEREFORE, defendants pray plaintiff take nothing by its complaint, that plaintiff's complaint be dismissed, and that defendants be awarded their costs and disbursements herein.

Dated: November 26, 1979.

WARREN SPANNAUS

Attorney General

State of Minnesota

By: RICHARD L. VARCO, JR.

Special Assistant

Attorney General

240 Bremer Building

419 North Robert Street

St. Paul, Minnesota 55101

Telephone: (612) 296-7862

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-79-530

THE UNITED STATES JAYCEES, a
non-profit Missouri corporation, on behalf of
itself and its qualified members,

Plaintiff,

-vs-

MARILYN E. McCLURE, Commissioner,
Minnesota Department of Human Rights,
WARREN SPANNAUS, Attorney General of the State of
Minnesota, and GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Defendants.

STIPULATION

The parties, by their respective undersigned counsel, hereby stipulate and agree as follows:

1) On October 31, 1979, the above entitled action was commenced in which the plaintiff, The United States Jaycees, challenged the validity, under the federal Constitution, of the interpretation and applicability to the plaintiff, of Minn. Stat. §§363.01, Subd. 18 and 363.03, Subd. 3. The federal constitutional issues presented cannot be reached, however, unless and until the state Courts of Minnesota have rendered an authoritative interpretation of said state statutes.

2) Also on October 31, 1979, the plaintiff herein filed and served its Petition for Review in the District Court of Ramsey County seeking to review the Order of October 9, 1979 of

State Hearing Examiner George Beck in which Examiner Beck held that The United States Jaycees were in violation of said state statutes and enjoined The United States Jaycees as set forth in Exhibit A attached hereto.*

3) Despite the efforts of The United States Jaycees to advance the state review proceedings and to secure the early assignment of a state district judge to that case, the District Court of Ramsey County has refused to do so and it now appears that said review proceedings in state district court will not be finally determined for possibly another two years, thus effectively threatening to substantially delay the disposition of this action.

4) The plaintiff herein has advised defendants that, unless the litigation arising out of the underlying dispute is expedited, the plaintiff will seek a stay of Examiner Beck's Order with the Ramsey County District Court and, failing that, will seek a preliminary injunction in this Court against the enforcement of Examiner Beck's Order. The parties agree that the added burden of litigation which will thus occur is not in the interests of either party and creates the substantial risk of diverting this matter into complex procedural and technical disputes, including appeals, which are unrelated to the substantive issues.

5) The parties further agree that the key statutory issue is whether The United States Jaycees is a "place of public accommodation" within the meaning of Minn. Stat. §363.01, Subd. 18 and that issue ought to be resolved by the Minnesota Supreme Court before this Court proceeds to determine the federal constitutional issues which will arise if the statutory

* This document is found at page 93 in the Appendix to the printed Jurisdictional Statement and is therefore deleted from this Appendix.

issue is resolved against The United States Jaycees. If the statutory issue is resolved in favor of The United States Jaycees, this action will be rendered moot and will be subject to dismissal on that ground.

6) The plaintiff has asserted that continued delay in the final disposition of this matter, while the injunction issued by Examiner Back is in force, may create unforeseen and undesirable problems if, after a lengthy delay, this litigation should ultimately be decided in front of The United States Jaycees.

7) The parties are in agreement that, in the interest of preventing injustice due to delay and in avoiding unnecessarily complex litigation arising out of the plaintiff's efforts to secure a stay or preliminary injunction, the core state statutory issue described above should be certified by this Court to the Supreme Court of Minnesota; the parties hereby stipulate that the Court may execute and enter its certification in the form attached hereto.

JA-31

Dated: March 24, 1980

**MACKALL, CROUNSE &
MOORE**

By: CLAY R. MOORE

**1000 First National Bank
Building**

**Minneapolis, Minnesota 55402
and**

CARL D. HALL, JR.

HALL, SUBLETT,

McCORMICK & ANDREWS

1776 Williams Center

Tulsa, Oklahoma 74172

Attorneys for Plaintiff

The United States Jaycees

Dated: March 24, 1980

State of Minnesota

by WARREN SPANNAUS

Attorney General

By: RICHARD L. VARCO, JR.

Special Assistant

Attorney General

240 Bremer Building

St. Paul, Minnesota 55101

Attorney for Defendants

Marilyn E. McClure,

Commissioner, Minnesota

Department of Human

Rights, Warren Spannaus,

Attorney General of the State

of Minnesota and George A.

Back, Hearing Examiner of

the State of Minnesota

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-79-530

THE UNITED STATES JAYCEES, a
non-profit Missouri corporation, on behalf of itself and
its qualified members,

Plaintiff,

-vs-

MARILYN E. McCLURE, Commissioner,
Minnesota Department of Human Rights,
WARREN SPANNAUS, Attorney General of the State of
Minnesota, and GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Defendants.

CERTIFICATION OF STATE LAW ISSUE TO
MINNESOTA SUPREME COURT

On March 20, 1980, the parties appeared before the Court represented by Clay R. Moore, Esq. for the plaintiff The United States Jaycees, and Richard L. Varco, Jr., Special Assistant Attorney General, representing the defendants McClure, Spannaus and Beck in their official capacities. The parties have jointly requested, for the reasons stated in their stipulation attached hereto, that this Court certify a dispositive issue of state law to the Supreme Court of Minnesota. It appears to the Court that such certification will materially advance this litigation to final conclusion.

Based on the representations of counsel, their attached stipulation, and the files and records of this Court, good cause has been shown for the following certification:

The Court hereby certifies to the Supreme Court of the State of Minnesota the question of law desired herein and requests said Supreme Court to answer said question pursuant to Minnesota Statute §480.061.

In conformity with Minnesota Statute §480.061, Subd. 3, the following is stated:

1) *Questions of Law Certified*

Is The United States Jaycees a "place of public accommodation" within the meaning of Minn. Stat. §363.01 Subdivision 18?

2) *Relevant Facts and Nature of Controversy*

The parties have agreed, by signature of their respective counsel hereto, that the evidentiary facts relevant to the question of law presented are those contained in the Order of State Hearing Examiner George A. Beck dated October 9, 1979, a copy of which is attached hereto as Exhibit A and in the transcript and exhibits comprising the record in the state administrative proceeding which gave rise to Examiner Beck's Order of October 9, 1979.

The nature of the controversy is as follows: The State of Minnesota by its Commissioner of Human Rights, has charged The United States Jaycees with a violation of Minn. Stat. §363.03, Subd. 3 and 6 by reason of its By-laws which restrict full voting membership in The United States Jaycees to young men between the ages of 18 and 35, thereby denying such membership to women. Said By-laws also define a local Jaycee chapter to be qualified for continuing chapter membership in The United States Jaycees only if its officers, directors and regular members are young men.

State Hearing Examiner George Beck, on October 9, 1979, after a hearing found The United States Jaycees in violation of Minn. Stat. §363.03, Subd. 3 and enjoined The United States Jaycees in the manner set forth in his attached Order.

The pivotal state law question is whether The United States Jaycees is a "place of public accommodation" within the meaning of Minn. Stat. §363.01, Subd. 18. It appears to this Court, and the parties agree, that there is no controlling precedent in the decision of the Minnesota Supreme Court on this question or the meaning and extent of the definition of "place of public accommodation" as contained in §363.01, Subd. 18.

The above entitled action in this Court was commenced under the federal Civil Rights Act. 42 U.S.C. §1983 28 U.S.C. §§1343, 1331 and 1332 and raises only the question of federal constitutional law which will arise if the state statutes referred to are interpreted by the Supreme Court of Minnesota so as to apply the statutory definition of "place of public accommodation" to The United States Jaycees and to thereby result in a finding that The United States Jaycees' By-laws, and the enforcement of those By-laws, is in violation of Minn. Stat. §363.03, Subd. 3. The plaintiff The United States Jaycees has reserved those federal constitutional issues for decision by this Court pursuant to *England vs. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 11 L.Ed 2d. 440, 84 S.Ct. 461 (1964).

3) Dispositive Nature of Question Certified

If the Supreme Court of Minnesota should determine the state statutory interpretation issues favorably to

The United States Jaycees, that decision will be dispositive of this action by rendering this action moot.

If the Supreme Court of Minnesota should determine the issues in favor of the defendants, this Court can then promptly proceed to the question of whether those statutes, as so interpreted and applied, violate the Constitution of the United States in any respect. A decision by the Minnesota Supreme Court on the question certified herein will, therefore, materially advance this action to its final disposition.

The Clerk is directed to prepare a certified copy of this certification, under the seal of this Court and forward the same to the Supreme Court of the State of Minnesota.

It is further ordered that the parties shall forward to the Supreme Court of the State of Minnesota the record in the state proceedings which are the subject of Examiner Beck's Order of October 9, 1979, including the transcript and all exhibits therein.

Dated: March 24, 1980.

DIANA MURPHY

United States District Judge

No. 83-724

Office - Supreme Court, U.S.
FILED

DEC 1 1983

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, Commissioner, Minnesota Department of Human Rights; HUBERT H. HUMPHREY III, Attorney General of the State of Minnesota; and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of itself and its qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

CARL D. HALL, JR.

Counsel of Record

6935 South Delaware Place

Tulsa, Oklahoma 74136

Telephone: (918) 492-6600

CLAY R. MOORE and

Mackall, Crounse & Moore

1600 TCF Tower

Minneapolis, Minnesota 55402

Telephone: (612) 333-1341

Counsel for Appellee

TABLE OF CONTENTS

	Page,
Motion to Affirm	1
The Question is Substantial: The Court should render a Dispositive Decision, Summarily or Otherwise ..	1
Statement	5
Argument	11
I. The Court of Appeals was correct in holding that application of Minnesota's Public Accommoda- tion Law to the Jaycees directly interferes with the Jaycees' First Amendment right of association	11
a. The State's action would destroy the Jaycees' Ability to Achieve its Purpose.	11
b. The Constitutional Right of Freedom of Asso- ciation.	14
c. The State has Failed to Demonstrate a Com- pelling Governmental Interest.	17
II. The Court of Appeals was correct in holding the Statute void for vagueness as applied	22
III. Overbreadth	25
IV. Equal protection	26
V. Conclusion	26

TABLE OF AUTHORITIES

Statutes:

Minn. Stat. §363.01, Subd. 18 and §363.03 Subd. 3 ..	10
Minn. Stat. §363.01(18)	23
Minn. Stat. §383.101	24
Minn. Stat. §363.071 Subd. 2	24
Minn. Stat. §363.091	24

Cases:

Abood v. Detroit Board of Education, 431 U.S. 209, at 231 (1977)	16
Buckley v. Valeo, 424 U.S. 1 (1976) at 25	17
Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) ..	23
Curran v. Mount Diablo Council of the Boy Scouts of America, 195 Cal. Rptr. 325 (1983)	4
Elrod v. Burns, 427 U.S. 347 (1976) at 362-363 ..	17, 19
Grayned v. City of Rockford, 408 U.S. 104 (1972) ..	23
Griswold v. Connecticut, 381 U.S. 479 and 483	16
Heffron v. Int'l. Soc. For Krishna Consc., Inc., 452 U.S. 640 (1981)	18
Junior Chamber of Commerce of Kansas City v. Missouri State Junior Chamber of Commerce, 508 F.2d 1031 (8th Cir. 1975)	2
Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir. 1974), <i>cert den.</i> 419 U.S. 1026 (1974)	2
Larson v. Valente, 456 U.S. 228 (1982)	18, 21
Mandell v. Bradley, 432 U.S. 173, 53 L.Ed.2d 199, 97 S.Ct. 2238 (1977)	3
N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958)	15
N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963) ..	18, 22
New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2nd Cir. 1975)	2
Rotary Club of Duarte, et al., v. Board of Directors of Rotary International, Sup. Ct., Los Angeles, No. C244,253	4
Shelton v. Tucker, 364 U.S. 479 and 486 (1960)	15
Smith v. Goguen, 415 U.S. 566, 573 (1974)	23
The United States Jaycees v. McClure, et al., 305 N.W. 2d 764 (1981)	10
United States Jaycees v. Bloomfield, 434 A.2d 1379 (D. C. App. 1981)	2
United States Jaycees v. Richardet, et al., 666 P.2d 1008 (Alaska 1983)	2

United States v. Cardiff, 344 U.S. at 174, 176 (1952)	23
U.S. Power Squadron v. State Human R. App. Bd., 452 NE2d 1199 (N.Y. 1983)	4
Winters v. New York, 333 U.S. 507, 514 (1948)
.....	22, 23, 24

Secondary Authority:

1 Encyclopedia of Associations, 16th Ed., Detroit, Gale Research Co., 1981	5, 15
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

No. 83-724

IRENE GOMEZ-BETHKE, Commissioner, Minnesota Department of Human Rights; HUBERT H. HUMPHREY III, Attorney General of the State of Minnesota; and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of itself and its qualified members,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

Appellee The United States Jaycees¹ moves the Court to affirm the judgment of the Court of Appeals on the ground that the judgment is manifestly correct.

The Question is Substantial: The Court should render a Dispositive Decision, Summarily or Otherwise.

¹The United States Jaycees has no corporate subsidiaries or affiliates. Sup. Ct. Rule 28(1).

By this Motion to Affirm, The United States Jaycees (Jaycees) seek a dispositive decision which will hopefully end years of persistent and continuing litigation challenging the Jaycees all male membership policy. The earlier round of cases involved claims that the Jaycees, by accepting certain federal grants, had become subject to equal protection dictates of the Fifth Amendment, akin to state action under the Fourteenth. These challenges were successively rejected by three Courts of Appeals. *Junior Chamber of Commerce of Kansas City v. Missouri State Junior Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975); *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856 (2nd Cir. 1975); *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*, 495 F.2d 883 (10th Cir. 1974), *cert. den.* 419 U.S. 1026 (1974). The current round of attacks in Minnesota and elsewhere are based on expansive interpretations of state public accommodations laws. The Jaycees has successfully defended these attacks in Alaska and the District of Columbia², but faces litigation pending in California and Massachusetts and state administrative proceedings in Iowa and Pennsylvania.

In view of the adoption by thirty-three states of "public accommodation" statutes prohibiting discrimination on the basis of sex, enforcement by the Jaycees of its all male membership policy could embroil the organization in continuous multi-state litigation for at least the next decade.

The Jaycees do not question the substantiality of the constitutional issues presented. However, of the two grounds relied upon by the Court of Appeals, only one—freedom of

²United States Jaycees v. Richardet, et al., 666 P.2d 1008 (Alaska 1983); United States Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. App. 1981).

association—has a broad and dispositive impact upon all pending and threatened litigation in which state public accommodations laws have been invoked against the Jaycees. The additional ground of vagueness could arguably affect only Minnesota and have no impact upon similar litigation elsewhere.³

The practical problem faced by the Jaycees at this juncture arises from the fact that a summary affirmance of the Court of Appeals decision, without opinion by this Court, may be viewed by other state and federal courts as equivocal or non-dispositive of the basic issue. A summary affirmance without opinion acts on its face only to affirm the judgment below but not necessarily the reasoning by which it was reached. *Mandell v. Bradley*, 432 U.S. 173, 53 L.Ed.2d 199, 97 S.Ct. 2238 (1977). The Jaycees are forced to acknowledge the possibility that some other state and federal courts outside the Eighth Circuit may disagree with the Eighth Circuit.⁴ Other courts which would disagree with the Eighth Circuit, if writing on a clean slate, may be tempted to view an unexplained summary affirmance as grounded only upon the narrow issue of vagueness peculiar to the Minnesota statute. The more basic issue of freedom of association, therefore, may remain subject to continuing litigation which

³As a practical matter, on the other hand, it may be difficult for any state court or legislature to avoid creating an impermissibly vague statute without colliding with other constitutional objections based on freedom of association, overbreadth, equal protection, or even the bill of attainder clause. As the Court of Appeals pointed out, the Minnesota Supreme Court undoubtedly ended up with an impermissibly vague statute in an effort to avoid other constitutional objections. A-38.

⁴The Jaycees remain firm in its belief of the validity of its position. This very case, however, is ample evidence of the potential for sharp conflict among judges and we cannot assume that these intense disagreements would be confined to Minnesota or the Eighth Circuit.

in turn may encourage other states to continue to invoke their public accommodation laws against the Jaycees and other organizations which confine their membership to persons of one gender, national gender, national origin, or religious denomination.

If this Court should grant the Motion to Affirm, the Jaycees request that the Court specify that it is doing so on both the freedom of association and vagueness grounds relied upon by the Court of Appeals. Unless the danger of an equivocal summary affirmance can be so avoided, the Jaycees request alternatively that the case be accepted for full review.

The overriding need for a dispositive result is not confined to the Jaycees. Similar public accommodation theories have been advanced against the Boy Scouts of America⁵, the United States Power Squadrons⁶, and Rotary International⁷. No all female organization has been challenged, but the principle involved is the same. Moreover state public accommodation laws typically bar discrimination on the grounds of national origin, race and religious belief in addition to sex. If a state, by the expedient of labeling an organization a

⁵In *Curran v. Mount Diablo Council of the Boy Scouts of America*, the California Court of Appeal held that complaint stated cause of action under California public accommodation law which alleged that plaintiff was expelled from membership in the Boy Scouts of America on the basis of his homosexuality. 195 Cal. Repr. 325 (1983).

⁶*U.S. Power Squadron v. State Human R. App. Bd.*, 452 NE2d 1199 (N.Y. 1983) holding United States Power Squadrons, a membership organization, comprised of 650 local squadrons in the United States, is a place of "public accommodation" under New York law and must admit women to membership.

⁷In *Rotary Club of Duarte, et al., v. Board of Directors of Rotary International*, trial court held Rotary is not a "business establishment" under California public accommodation law. Case is now on appeal to the California Court of Appeal. Sup. Ct., Los Angeles, No. C244,253.

place of "public accommodation" as did Minnesota in this case, can forbid discrimination on such other grounds, the ability of B'nai Brith and the Knights of Columbus to confine their membership to persons of one religious persuasion must necessarily be in doubt. Likewise the hundreds of organizations confining their membership to persons of one national origin are likewise in peril⁸.

The historically accepted domain of public accommodation statutes has been confined to restaurants, hotels, movie theaters and the like which involve no significant private associational issues. If states like Minnesota choose to expand these statutes beyond their historical scope, the same statutes will now threaten the heretofore unchallenged and fundamental freedom to choose one's companions in a private membership organization.

The Jaycees, therefore, presents its motion to affirm in the hopes that this basic issue, by summary affirmance, may be finally resolved and that this threat to a fundamental right may be ended.

STATEMENT

The United States Jaycees is a tax-exempt, non-profit Missouri corporation headquartered in Tulsa, Oklahoma. It was founded in St. Louis, Missouri, in 1920, under the name United States Junior Chamber of Commerce. It continued to operate under that name until 1965, when its name was changed to The United States Jaycees. It is a private (in the sense of non-governmental) membership organization. It derives income primarily from membership dues and private sponsors. It receives no federal or state funds.

⁸For a compilation and description of such organizations, see 1 Encyclopedia of Associations, 16th Ed., Detroit, Gale Research Co., 1981.

Article 2 of the Jaycees' By-laws sets out the organization's purpose:

"A. This Corporation shall be a non-profit corporation organized for such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and national, and to develop true friendship and understanding among young men of all nations."

"B. Towards these ends, this Corporation shall adopt the following as its Creed:
We believe

That faith in God gives meaning and purpose to human life;

That brotherhood of man transcends the sovereignty of nations;

That economic justice can best be won by free men through free enterprise;

That government should be of laws rather than of men;

That earth's great treasure lies in human personality;

And that service to humanity is the best work of life."

Article 4 of the By-laws creates seven classes of membership, including Individual Members, also known as regular members, Associate Individual Members, Local Organization Members (local chapters) and State Organization Members (state chapters such as Minnesota, Alaska, etc.).

Individual Membership is equivalent to full or regular membership and is defined as "young men between the ages of eighteen (18) and thirty-five (35) . . .". The category of Associate Individual Member is reserved for those, including women, who do not qualify for regular membership. This category does not have the right to vote or serve as officers. The By-laws require that local chapters be "young men's organizations of good repute . . . organized for purposes similar to and consistent with those" of the national organization. At the time of the trial before the District Court in August of 1981, the Jaycees had about 295,000 regular members in 7,400 local chapters.

The subject of full membership for women has been a matter of debate and discussion within the Jaycees. In 1975 the national Jaycees convention voted by a margin of approximately 90 percent to 10 percent against changing the By-laws to allow local chapters to admit women as regular members. The 1978 national convention voted 78 percent to 22 percent to reject the admission of women on a local option basis. In a national referendum in September of 1981, Individual Members of the Jaycees defeated another proposed local option amendment by a vote of 67 percent to 33 percent.

From its inception in 1920, the Jaycees has adopted and implemented thousands of programs to carry out the purpose for which it was organized. A sample of recent programs includes efforts to assist children afflicted with dia-

betes; shooting education; fund raising for treatment for Muscular Dystrophy; Junior Athletics; and programs to encourage participation in government. In addition the Jaycees has taken public positions on a variety of national issues. For example, it has favored the right to vote for citizens of the District of Columbia; urged revision of AAU Standards; supported Congressional legislation to change the method of computing pay for members of the Armed Forces; supported the Uniform Vehicle Code; endorsed the Mutual Security Program which gave assistance to underdeveloped nations to develop economic and social stability; urged federal tax reform and corresponding economy in government; urged repeal of the excise tax on telephone service; urged preservation of wilderness areas for use in recreational and scientific purposes; urged electoral college reform; opposed legislation introduced favoring socialized medicine; supported the right of 18-year-olds to vote; and supported the withdrawal of American combat forces from Southeast Asia.

Where appropriate, the Jaycees has adopted specific programs to implement its position of national issues. For example, in 1981, the Jaycees adopted and implemented the program "Enough is Enough" designed to assist the current administration in its efforts to carry out its economic policy. The "Enough is Enough" Program has been distributed to all local chapters of the Jaycees. The Jaycees publicly supported and actively sought statehood for Alaska and Hawaii and publicly urged the implementation of the Hoover Commission Recommendations.

The Jaycees believes in leadership training for young men. It believes that its objectives can best be accomplished by involving young men in the main stream of American social action and political thought. State and Local Organization

Members, in carrying out and implementing leadership training of young men, have likewise adopted the philosophy that the training of young men includes involvement in controversial public issues of the times. As a consequence, Local and State Organization Members of the Jaycees have worked on numerous projects which speak out on public issues. These include participation by thousands of local organizations in the Jaycees "Enough is Enough" Program which supports the current administration's economic policy. State Jaycees organizations in many states have adopted programs to urge the legislatures of their respective states to call for an amendment to the United States Constitution to require a balanced Federal Budget. Local and state projects number in the thousands and include, to name a few, the action of the Montana Jaycees in working with the Montana Civil Liberties Union for the successful passage of legislation dealing with employment restrictions for ex-offenders; the action of the Annandale Virginia Jaycees in working for passage of increased benefits for low-income families; the action of the Maryland Jaycees in 1973 in pushing for the adoption of a law that would permit full voting rights for ex-offenders; the action in May of 1964 of the Atlanta Jaycees in filing suit against the State of Georgia in Federal District Court on reapportionment of congressional districts.

The Jaycees publishes a magazine called "Future", which is sent to every Jaycee in the U.S.A. The editors of "Future" have made it a practice to include articles on issues of public concern. "Future" offers an opportunity for the Jaycees to speak out on controversial issues of national importance. "Future" articles include the January 1980 article on the Jaycees' stand on socialized medicine; coverage in June of 1964 of a National Jaycees Officer's testimony before a

Congressional Committee on the Herlong Baker Tax Reform Bill; and articles supporting national tax reform.

Minnesota law forbids discrimination on the basis of sex, race, religion, etc. in "places of public accommodation". (Minn. Stat. §363.01, Subd. 18 and §363.03, Subd. 3). The Supreme Court of Minnesota interpreted this statutory phrase to apply to the Jaycees thereby effectively affirming the State Hearing Examiner's injunction prohibiting the Jaycees from enforcing its membership by-laws in Minnesota. (See *The United States Jaycees v. McClure, et al.*, 305 N.W.2d 764 (1981), reprinted at A-69, and order of hearing examiner at A-93). The Court of Appeals concluded that the application of Minnesota's statute to the Jaycees was invalid on two alternative and independent grounds:

1. It directly interfered with the Jaycees First Amendment right of association without a sufficient showing of compelling governmental interest, and
2. The Minnesota statute was void for vagueness as interpreted and applied, because it provided no ascertainable standard for determining whether an organization was exempted as "private" or included as "public". A-41.

ARGUMENT**I.**

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT APPLICATION OF MINNESOTA'S PUBLIC ACCOMMODATION LAW TO THE JAYCEES DIRECTLY INTERFERES WITH THE JAYCEES' FIRST AMENDMENT RIGHT OF ASSOCIATION.

- a. The State's action would destroy the Jaycees' Ability to Achieve its Purpose.**

At the outset, it is essential that the purpose of the Jaycees be accurately defined. Article 2 of the Jaycees' By-Laws defines that purpose as follows:

- A. This Corporation shall be a non-profit Corporation organized for such educational and charitable purposes as will promote and foster the growth and development of *young men's* civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplemental educational institution to provide *them* with opportunity for personal development and achievement and an avenue for intelligent participation by *young men* in the affairs of their community, state and nation, and to develop true friendship and understanding among *young men* of all nations. (Emphasis supplied.)**

The core purpose of the Jaycees is, therefore, to provide *young men* with the benefits of participation in organizational activities directed to civic purposes. By definition, that purpose requires that membership be limited to young men.

The root issue is whether a volunteer membership organization may, without government interference, confine its purpose to serving a limited segment of society defined by gender, race, national origin, etc., and limit its membership accordingly. The case must be viewed in the same light as if the State attempted to prevent the formation of associations composed solely of black persons, Jews, women, Norwegians or Vietnamese for the purpose of improving the lot of those persons.

The activities of the Jaycees are multifold, and range from the simple pleasures of personal association, to participation in internal decision making, to the development of social consciousness through community service projects and the formulation of Jaycee positions on issues of social and political concern. All of these activities are expressions of young men, by acts and by words, in furtherance of the Jaycees' core purpose to serve young men. By limiting its membership accordingly, the members have thereby expressed their fundamental belief that young men deserve this opportunity.

The Court of Appeals correctly rejected the State's sterile view of the Jaycees as a leadership training school. The fact that such skills are important and may be developed by participation as a full member is obvious but misses the point. The Jaycees hardly holds a monopoly on such opportunities. Those same opportunities are immediately available to women in a bewildering variety of non-gender restricted organizations such as local churches, political parties, and business oriented groups such as the National Society of Fund Raising Executives. Likewise, the development of such skills naturally flow from membership in all-female organizations such as the National Federation of

Business and Professional Women's Clubs, the National Association for Female Executives and the Junior League. The core purpose of those women's organizations is the advancement of women's interest as they perceive those interests to be, and the achievement of that purpose begins necessarily with restriction of their membership to women. The Jaycees, by restricting membership to young men, likewise seeks to preserve its ability to achieve its core purpose of serving young men.

The power sought by the State is alarming. If the State can, by expansive statutory interpretations, affix the label of "place of public accommodation" where it wishes, hundreds of organizations with restrictive membership policies are in jeopardy. Private groups based on religious belief (such as B'Nai Brith or Knights of Columbus) or ethnic or national origin (such as Polish Women's Alliance, Columbia Squires or Sons of Norway) will be threatened. This follows because, once the "public accommodation" label is affixed, it automatically invokes the Minnesota law's prohibition against discrimination by reason of national origin and religious belief in addition to sex.

The law of the State of Minnesota, as it presently stands, means that, if the State chooses to affix the label "place of public accommodation", all female groups will be forced to serve the interests of men, all black groups will be compelled to take on the burden of serving the special interests of white people, and ethnic groups will be prevented from confining their membership to the only persons who would have an interest in the unique traditions of those groups.

In a superficial sense, it may be true that many Jaycee activities would be ostensibly unaffected by the forced inclusion of women, but this misses the point. The State has

dictated, by use of a penal statute, that Jaycees may no longer confine its core belief and the central reason for its existence to the advancement of the interests of young male members but must also serve the interests of young women. Insofar as the interests of young men and young women may conflict (a near certainty in light of current sociological trends), the damage to the organization would become apparent. In principle, the State's assumption of this power is no different than if it dictated to the NAACP that it must also devote its energies to those matters of particular interest to white people.

This door to State power should be closed before further damage is done. This contretemps may not have attracted overwhelming public sympathy for the Jaycees, but the principle involved is fundamental. The use of a State penal statute to force a change in the Jaycees' purpose and perspective threatens the fundamental liberties of everyone.

b. The Constitutional Right of Freedom of Association.

The right to form and belong to an almost infinite variety of membership organizations has been enjoyed by Americans since early in the 19th Century. Americans are "joiners", and they join in ways which reflect their individual viewpoints and desires. It has not been until very recently that the right of an organization to determine its own membership has been questioned. Alexis de Toqueville, in his commentary on early 19th Century America, observed:

" . . . Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general

or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. . . ." (Democracy in America, Alexis de Toqueville)

The Encyclopedia of Associations⁹, lists thousands of organizations, many founded early in the 19th Century, which limit their membership to a single sex, or to persons of one religious denomination or ethnic origin.

Although the right or freedom of association is not expressly mentioned in the First Amendment or any other provision of the Constitution, the decisions of this Court establish with unmistakable clarity that the freedom of an individual to associate is protected by the First and Fourteenth Amendments, both as an expression in itself and as a means of enhancing the protection given to the express guarantees.

In *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), this Court said:

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." (Citations omitted.)

In *Shelton v. Tucker*, 364 U.S. 479 and 486 (1960), this Court characterized the right of free association as a

⁹16th Ed., Detroit, Gale Research Co., 1981.

"... right which, like free speech, lies at the foundation of a free society." And in *Griswold v. Connecticut*, 381 U.S. 479 and 483, the Court said:

"The right of 'association', like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."

Justice Stewart confirmed the breadth of the right of association when in *Abood v. Detroit Board of Education*, 431 U.S. 209, at 231 (1977), he stated:

"... our cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection. (Emphasis supplied.)

"... Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs the critical constitutional inquiry."

The State does not deny that the right of association is entitled to constitutional protection. Since 1920 the Jaycees has exercised that right by fostering the development of young men's organizations; its membership policy is the expression of its belief that young men deserve such an organization. The right to continue that expression cannot be encroached upon by the State absent a showing of compelling interest.

c. The State has Failed to Demonstrate a Compelling Governmental Interest.

In *Buckley v. Valeo*, 424 U.S. 1 (1976) at 25, this Court reiterated the standard of judicial review to be applied to cases challenging "state action" infringing upon basic constitutional rights:

The Court's decisions involving associational freedoms establish that *the right of association is a "basic constitutional freedom," . . . ,* that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." . . . In view of the *fundamental nature of the right to associate*, governmental "action which may have the effect of curtailing the freedom to associate is subject to the *closest scrutiny.*" . . . (Emphasis supplied.)

In *Elrod v. Burns*, 427 U.S. 347 (1976) at 362-363, this Court again set forth the standard of review which must be applied in this case:

. . . It is firmly established that a significant impairment of First Amendment rights must survive *exacting scrutiny.*—"This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct." . . . *Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest." The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. . . .* (Emphasis supplied.)

Thus the burden falls squarely on the State of Minnesota to justify its encroachment on the Jaycees freedom of asso-

ciation by advancing and showing an interest which is of paramount and of vital importance.

In addition, the State's action must be "closely fitted" to the furtherance of the alleged compelling governmental interest. *Larson v. Valente*, 456 U.S. 228 (1982)."

The State makes no effort to demonstrate anything more than a desire to prevent the Jaycees from excluding women; no "compelling" interest is claimed as to membership organizations generally. The State argues sophistically that it has a compelling interest in prohibiting sex discrimination in "public accommodations". This argument begs the question and substitutes the use of labels for reasoned analysis. The issue before the Court is not whether the State has demonstrated a vital interest in preventing discrimination within the general category of "public accommodations". The issue is far more precise, i.e., whether the State has demonstrated a compelling interest in prohibiting the Jaycees from confining its Individual Memberships to young men. The State cannot by virtue of affixing the label "public accommodation" to the Jaycees, avoid the "strict scrutiny" which the Constitution requires or predetermine the constitutional issues.

... A state cannot foreclose the exercise of constitutional rights by mere labels.

NAACP v. Button, 371 U.S. 415, 429 (1963).

If the law were otherwise, the State of Minnesota could affix the label "public accommodation" to any of the hundreds of membership organizations in Minnesota and, by

¹⁰This case does not present the narrow "time, place, and manner restriction" upheld in *Heffron v. Int'l. Soc. For Krishna Conc., Inc.*, 452 U.S. 640 (1981).

such a device, compress them into the same mold as restaurants and hotels as to which the applicability of public accommodation laws is unquestioned. The State could, for example, affix the label "public accommodation" to the Girl Scouts and require that organization to admit boys. It could also affix the "public accommodation" label to the Sweet Adelines and the PEO Sisterhood and require those organizations to admit men. The examples are legion and would include all male civic organizations such as Rotary, Optimists, and Lions; such religiously affiliated organizations as the Knights of Columbus; and ethnic organizations such as The Sons of Norway.

If the State is to dictate the composition of private membership organizations, it must prove a great deal more than it has. Its burden is particularly heavy because of the proliferation not only of gender-limited groups but also groups defined by national origin, religious affiliation and race. These private groupings are healthy manifestations of a culturally rich pluralistic society; the State has yet to justify its potential threat to this unique America asset.

The question of the admission of women to theaters, restaurants and hotels is radically different and involves none of the private associational characteristics which are inherent in the question of who shall and shall not be granted membership in a voluntary membership organization. The State, if it is to justify its actions in dictating the membership policy of the Jaycees and other similar organizations, must advance and demonstrate the existence of an interest which is "compelling" (*Elrod v. Burns, supra*, at 362) and of an entirely different nature than that applicable to restaurants, hotels and the like. The State has not done so in this case.

The State argues that requiring full membership for women would not compel the Jaycees to abandon its purpose of providing leadership training, self improvement and community involvement to young men. This argument, however, overlooks the fact that by dictating full membership for women, the State has thwarted the Jaycees' fundamental and express purpose to serve only young men.

It is arguable that the male members of the Jaycees might benefit in some respects from the forced inclusion of women as full members. But this is no justification for the State's action, nor is it the business of government to make such determinations. Stated in its starkest terms, the right the Jaycees seek to vindicate is the right to decide for themselves whether the admission of women will be beneficial or not. Their decision may be wrong, offensive, or lacking in logic, but no government or its courts has the right to substitute its judgment for that of the members of the Jaycees absent demonstration by the State of a "compelling interest" for doing so.

The exercise of any First Amendment right, such as the right of freedom of speech, for example, may be actually destructive of the immediate best interests of the person exercising that right. But the Constitution does not grant government the power to prevent the exercise of that right even if misguided.

Finally, it should be noted that the Minnesota Supreme Court, in attempting to limit the application of its public accommodation law to only so-called "public" membership organizations, declared that organizations "such as" the Kiwanis may freely exclude women. The Minnesota court stated:

We therefore reject the national organization's suggestion that it be viewed analogously to private organizations such as the Kiwanis International organization. A-83.

This statement, which is an integral part of the Minnesota Court's interpretation of the statute, makes a mockery of any claim by the State of a "compelling" state interest. The Kiwanis is approximately the same size as the Jaycees (about 300,000) and has solicited new members with no less success than the Jaycees. The Kiwanis, if anything, is less selective than the Jaycees, for it extends membership to *all* men, not just those between 18 and 35. The two organizations are, for these purposes, legally indistinguishable and they both exclude women.

If the desire of the older men of the Kiwanis to remain an all-male organization is not thought by Minnesota to pose any threat to the common good, it can hardly be argued that the identical policy of the younger men of the Jaycees menaces the peace of that state or justifies the use of its police power.

In addition, the wholesale exclusion of indistinguishable organizations "such as" the Kiwanis from the penal impact of the state statute hardly bespeaks a statute which is "closely fitted" to the furtherance of the State's alleged compelling interest. *Larson v. Valente, supra*. The exclusion of the Kiwanis, rather, betrays a haphazard and discriminatory approach to law enforcement.

The State has not demonstrated that its actions have been closely fitted in furtherance of a compelling governmental interest.

II.
**THE COURT OF APPEALS WAS CORRECT
 IN HOLDING THE STATUTE VOID
 FOR VAGUENESS AS APPLIED**

For purposes of vagueness analysis, the Minnesota Supreme Court's opinion became the words of the statute, as if the Legislature itself had so stated. *NAACP v. Button*, 371 U.S. 415, 432 (1963); *Winters v. New York*, 333 U.S. 507, 514 (1948). The Minnesota court found itself in the dilemma of avoiding, on the one hand, an overly broad opinion encompassing too many organizations and, on the other hand, finding some basis on which to outlaw the Jaycees' membership policy. The Court developed, as a result, its "public" versus "private" dichotomy, labeling the Jaycees as "public." The criteria used were an amorphous combination of size, recruiting technique, and selectivity, but no workable standards of size, recruiting or selectivity were provided by which to determine when a "private" organization becomes "public". The Minnesota court sought rather to do by example what it failed to do by reasoned explanation. The example of what it meant by a "private" membership organization free to exclude women was the Kiwanis International.¹¹ The Jaycees and Kiwanis are indistinguishable

¹¹The Minnesota Court said:

Private associations and organizations—those, for example, that are selective in membership—are unaffected by Minn. Stat. §363.01(18) (1980). Any suggestion that our decision today will affect such groups is unfounded.

We, therefore, reject the [Jaycees] national organization's suggestion that it be viewed analogously to private organizations such as the Kiwanis International Organization.

305 N.W.2d at 771.

for these purposes, and the State makes no effort to suggest any distinction. The Court of Appeals correctly observed:

[T]he state Supreme Court has left us without any discernible standard by which to distinguish "public" from "private." The opinion does not say what it is about the Kiwanis that makes it "private."

709 F.2d at 1577.

The Court of Appeals thereupon held the statute as applied and interpreted to be void for vagueness. Its discussion is as concise an argument in support of the Jaycees' position as could be stated here. The Court of Appeals applied the established principle that a penal statute must advise persons of common intelligence whether they are or are not within the affected class of persons. A greater degree of precision is necessary when fundamental liberties are at stake. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *United States v. Cardiff*, 344 U.S. at 174, 176 (1952); *Winters v. New York*, 333 U.S. 507, 515-516 (1948); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

The State contends that the Minnesota court's "public-private" categorization is merely an effort to create a "private club" exception to the statute,¹² and that the concept of a "private club" is well defined in the decisional law. It is clear, however, that the Minnesota court created a much

¹²The Minnesota statute does not contain the "private club" exception found in other public accommodation laws. See Minn. Stat. §363.01(18). The Minnesota court was not deciding that the Jaycees were not a "private club" because that issue was irrelevant to the statutory scheme. Rather, it was determining whether the Jaycees was a public or private "association or organization" (See 305 N.W.2d at 774, A-83), a substantially broader concept.

broadest class of exempt membership organizations beyond the classic "private club." It specifically identified this class as "private organizations such as the Kiwanis International Organization" 503 N.W.2d at 771. The Kiwanis is no more or less a "club" in the accepted sense of that term than is the Jaycees.

Finally, the State does not attempt to distinguish the Jaycees from the Kiwanis for these purposes, nor could it do so. Rather, it seeks to avoid the issue by claiming the Minnesota court's reference to Kiwanis as "private" was "off hand" and meaningless (Jur. St. pp. 11 and 19). For purposes of vagueness analysis, the court's opinion is the statute, however, and every expression contained therein is the equivalent of a legislative enactment. *Winters v. New York*, 333 U.S. 507, 515-516 (1948). Every one of hundreds of membership organizations which are all-male or all-female are necessarily compelled to read that opinion to determine whether they can safely continue to exclude women or men or, like the Jaycees, safely change their organizational characteristics in some fashion so as to insure their "private" (and exempt) status.

The opinion compels all of them to wrestle with the impossible task of determining what makes the Jaycees "public" and the Kiwanis "private" with penal consequences awaiting them if they guess wrong.¹³ Even the Jaycees is presumably free to change its organizational characteristics in some fashion so as to become "private" like the Kiwanis and lawfully continue as an all-male organization. But, the

¹³A violation of the Minnesota Statute is a misdemeanor, Minn. Stat. §383.101, and exposes the violator to civil punitive damages, §363.071 Subd. 2, and the usual civil contempt penalties if an injunction is issued, as here, §363.071 Subd. 2 and §363.091.

Jaycees do not know what it is about the Kiwanis that justifies the disparate treatment afforded the two associations and the Jaycees would incur substantial risks if they failed to divine the Sphinx riddle posed by the Minnesota court.

The Court of Appeals was clearly correct in holding the statute vague as interpreted and applied. An affirmance on this ground alone is justified.

III.

OVERBREADTH

The Court of Appeals did not reach the issue of overbreadth, being unnecessary in view of its disposition of the case on other grounds. The issue remains, however, because of the threatened impact of Minnesota's interpretation of its statutory phrase "place of public accommodation" upon other organizations. The Minnesota law's prohibitory provisions fall equally upon discrimination by reason of creed, race, ethnicity, and religious belief, once the label of "public accommodation" is attached. Given the indefinite criteria employed by the Minnesota court and, in particular, its exemption of the Kiwanis, an organization based upon an ethnic tradition, such as The Sons of Norway, or religious affiliation such as B'Nai Brith or Knights of Columbus must necessarily be in doubt of its legality, not to mention the restraint imposed on those that would otherwise form new associations devoted to the peaceful advancement of groups defined by race, creed, ethnic background, or religious belief.

Minnesota's actions threaten to open a Pandora's box. Affirmance on this grounds alone is justified.

IV.**EQUAL PROTECTION**

While not treated by the Court of Appeals, the equal protection issue is starkly presented by the inexplicably disparate treatment rendered the Jaycees and the Kiwanis.

The irony of this case is that, while it was pending before the Court of Appeals, the Kiwanis International held its national convention in Minneapolis in June of 1982 and voted overwhelmingly to continue its all-male membership policy. This occurred virtually on the doorsteps of the Minnesota Supreme Court which had exempted Kiwanis for reasons which remain unexplained. Equal protection concepts speak to the cause of uniform and non-arbitrary law enforcement—a cause which has been mocked in this case.

V.**CONCLUSION**

The Court of Appeals was correct on all counts and could well have added overbreadth and equal protection as additional grounds.

The need to end this continuing litigation, which is now virtually national in scope, is paramount. The Jaycees pray, therefore, that any order granting this Motion specify this Court's affirmance of both grounds relied upon by the

Court of Appeals. Failing such specificity, the Jaycees request that the case be docketed for full review.

Respectfully submitted,

CARL D. HALL, JR.

Counsel of Record

6935 South Delaware Place

Tulsa, Oklahoma 74136

(918) 492-6600

CLAY R. MOORE and

Mackall, Crounse & Moore

1600 TCF Tower

Minneapolis, Minnesota 55402

(612) 333-1341

Counsel for Appellee

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In The
Supreme Court of the United States
October Term, 1983

ALEXANDER L. STEVAS.
CLERK

IRENE GOMEZ-BETHKE, Commissioner, Minnesota Department of Human Rights; HUBERT H. HUMPHREY III, Attorney General of the State of Minnesota; and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of itself and its qualified members,

Appellee.

On Appeal from the United States Court of Appeals
for the Eighth Circuit

**BRIEF FOR THE STATES OF CALIFORNIA
AND NEW YORK**
As Amici Curiae

In Support of Appellants' Jurisdictional Statement

JOHN K. VAN DE KAMP
Attorney General of the
State of California

ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General

MARIAN M. JOHNSTON
Deputy Attorney General
Counsel of Record

6000 State Building
350 McAllister Street
San Francisco, California 94102
Telephone: (415) 557-3991

Counsel for Amicus Curiae
State of California

November 28, 1983

(List of Additional Counsel on Inside Cover)

ROBERT ABRAMS
Attorney General of the
State of New York

ROSEMARIE RHODES
Bureau Chief,
Civil Rights Bureau
Assistant Attorney General

SHELLEY B. MAYER
Assistant Attorney General

2 World Trade Center
New York, New York 10047

Counsel for Amicus Curiae
State of New York

TABLE OF CONTENTS

	Pages
Interest of Amici Curiae	1
Statement of the Case	2
Summary of Argument.....	3
Argument:	
I. The regulation of the discriminatory practices of a group generally open to the public does not offend any constitutional guarantees.	4
II. A state's interest in eliminating discrimination by groups generally open to the public is direct, substantial and compelling.	11
III. The distinction between truly private clubs and those open to the general public is sufficiently specific to avoid unconstitutional vagueness.....	13
Conclusion	16

TABLE OF AUTHORITIES

CASES:

Anderson v. Celebrezze, — U. S. —, 103 S. Ct. 1564 (1983)	4, 11
Bell v. Maryland, 378 U. S. 226 (1964)	6
Bob Jones University v. United States, — U. S. —, 103 S. Ct. 2017 (1983)	12
Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28 (1948)	1
Brown v. Socialist Workers, — U. S. —, 103 S. Ct. 416 (1982)	5
Buckley v. Valeo, 424 U. S. 1 (1976)	4, 16
Burks v. Poppy Construction Co., 57 Cal. 2d 463, 20 Cal. Rptr. 609 (1962)	11
Civil Rights Cases, 109 U. S. 3 (1883)	1

TABLE OF AUTHORITIES—Continued

	Pages
Clover Hill Swimming Club v. Goldsboro, 47 N. J. 25, 219 A. 2d 161 (1966) _____	10
Commonwealth of Pennsylvania v. Loyal Order of Moose, Lodge No. 107, 448 Pa. 451, 294 A. 2d 594 <i>appeal dismissed</i> 409 U. S. 1052 (1972) _____	7
Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983) _____	1, 8, 15, 16
Griswold v. Connecticut, 381 U. S. 479 (1965) _____	6
Grove City College v. Bell, 687 F. 2d 684 (3rd Cir. 1982), <i>cert. granted</i> — U. S. —, 103 S. Ct. 1181 (1983) _____	7
Healy v. James, 408 U. S. 169 (1972) _____	5
In re Cox, 3 Cal. 3d 205, 90 Cal. Rptr. 241 (1970) _____	1
Junior Chamber of Commerce v. Missouri State Jaycees, 508 F. 2d 1031 (8th Cir. 1975) _____	6
Junior Chamber of Commerce v. United States Jay- cees, 495 F. 2d 883 (10th Cir. 1974), <i>cert. denied</i> 419 U. S. 1026 _____	6
Moose Lodge No. 107 v. Irvis, 407 U. S. 163 (1972) _____	6, 8
NAACP v. Alabama, 357 U. S. 449 (1958) _____	5
NAACP v. Button, 371 U. S. 415 (1963) _____	5
National Organization for Women v. Little League Baseball, Inc., 127 N.J. Super. 552, 318 A. 2d 33 (1974), <i>aff'd</i> 67 N. J. 320, 338 A. 2d 198 _____	9
Nesmith v. Young Men's Christian Assn., 397 F. 2d 96 (4th Cir. 1968) _____	8, 15
New York City Jaycees, Inc. v. United States Jay- cees 512 F. 2d 856 (2d Cir. 1975) _____	6
Norwood v. Harrison, 413 U. S. 455 (1973) _____	5
Olzman v. Lake Hills Swim Club, Inc., 495 F. 2d 1333 (2d Cir. 1974) _____	8, 15

TABLE OF AUTHORITIES—Continued

	Pages
Railway Mail Assn. v. Corsi, 326 U. S. 88 (1945)	6
Runyon v. McCrary, 427 U. S. 160 (1976)	5
Schwenk v. Boy Scouts of America, 275 Or. 327, 551 P. 2d 465(1976)	11
Smith v. Young Men's Christian Assn., 462 F. 2d 634 (5th Cir. 1972)	8
Stout v. Young Men's Christian Assn., 404 F. 2d 687 (5th Cir. 1968)	8
Sullivan v. Little Hunting Park, Inc., 396 U. S. 229 (1969)	7, 14
Tillman v. Wheaton-Haven Recreational Assn. Inc., 410 U. S. 431 (1973)	7, 14
United Mine Workers v. Illinois State Bar Assn., 389 U. S. 217 (1967)	5
United States v. Slidell Youth Football Assn., 387 F. Supp. 474 (E. D. La. 1974)	8, 15
United States v. Trustees of F.O.E., 472 F. Supp. 1174 (E. D. Wis. 1979)	8, 15
United States Jaycees v. Bloomfield, 434 A. 2d 1379 (D. C. App., 1981)	11
United States Jaycees v. McClure, 305 N. W. 2d 764 (Minn. 1981)	2
United States Jaycees v. McClure, 534 F. Supp. 766 (D. Minn. 1982)	2
United States Jaycees v. McClure, 509 F. 2d 1560 (8th Cir. 1983)	3
United States Jaycees v. Richardet, 666 P. 2d 1008 (Alaska, 1983)	11
United States Power Squadrons v. State Human Rights Appeal Board, 59 N. Y. 2d 401, 465 N.Y.S. 2d 871 (1983)	1, 9

TABLE OF AUTHORITIES—Continued

	Pages
Whispering Hills Country Club v. Kentucky, 475 S. W. 2d 645 (Ct. App. Ky., 1972) _____	10
Winchell v. English, 62 Cal. App. 3d 125, 133 Cal. Rptr. 20 (1976) _____	11
Wright v. Cork Club, 315 F. Supp. 1143 (S. D. Tex. 1970) _____	8, 15
Wright v. Salisbury Club, Ltd., 632 F. 2d 309 (4th Cir. 1980) _____	8, 14

STATUTES:

Title II of the Civil Rights Act of 1964, as amended, 42 U. S. C. §§ 2000a <i>et seq.</i> _____	7, 8
Title IX of the Education Act of 1972, 20 U. S. C. § 1681 _____	7
28 U. S. C. § 1254(2) _____	3
42 U. S. C. § 1981 _____	5, 7, 14, 16
42 U. S. C. § 1982 _____	7, 14, 16
42 U. S. C. § 2000a(e) _____	8, 15

TEXTS:

Burns, <i>The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality</i> , 18 Harv. C. R.—C. L. L. Rev. 321 (1983) _____	12
Goodwin, <i>Challenging the Private Club: Sex Dis- crimination Plaintiffs Barred at the Door</i> , 13 Sw. U. L. Rev. 237 (1982) _____	12
Hollingsworth, <i>Sex Discrimination in Private Clubs</i> , 29 Hastings L. J. 417 (1977) _____	12

TABLE OF AUTHORITIES—Continued

	Pages
Horowitz, <i>The 1959 California Equal Rights In "Business Establishments" Statute—A Problem In Statutory Application</i> , 33 So. Cal. L. Rev. 260 (1960)	1
OTHER AUTHORITIES:	
First Amendment, U. S. Constitution.....	4, 5, 7, 13
Supreme Court Rule 36(4)	1
Cal. Stats. 1897, ch. 108, § 1, p. 137	1
N. Y. Exec. Law § 296(2) (McKinney 1982)	1
Unruh Civil Rights Act, Cal. Civil Code § 51 (Cal. Stats. 1959, ch. 1866, § 1, p. 4424).....	1, 8, 11, 15

INTEREST OF AMICI CURIAE

The State of California, by its Attorney General John K. Van de Kamp, and the State of New York, by its Attorney General Robert Abrams, respectfully submit this brief as *amici curiae* pursuant to Supreme Court Rule 36(4).

Within the federal system, states have long played an essential role in requiring nondiscrimination by private enterprises affected with a public interest. In California, this common law doctrine first received statutory recognition in 1897 (Cal. Stats. 1897, ch. 108, §1, p. 137), and is now codified in the Unruh Civil Rights Act, Cal. Civil Code § 51 (Cal. Stats. 1959, ch. 1866, §1, p. 4424). *In re Cox*, 3 Cal.3d 205, 212-214 [90 Cal.Rptr. 24] (1970). Many states, including *amici*, enacted statutes forbidding discrimination by public accommodations in response to the holding in the *Civil Rights Cases*, 109 U.S. 3 (1883), that the federal government had no power to prohibit such private discrimination.¹ *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 33 (1948); Horowitz, *The 1959 California Equal Rights In "Business Establishments" Statute—A Problem In Statutory Application*, 33 So. Cal. L. Rev. 260, 277 (1960).

Amici's public accommodations statutes have recently been held applicable to organizations which offer membership to the general public but exclude a class of persons on a basis prohibited by law. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 731-732 [195 Cal. Rptr. 325] (1983); *United States Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y. 2d 401 [465 N.Y.S. 2d 871] (1983).

The decision below by the Court of Appeals jeopardizes the ability of *amici* and other states to enforce

¹New York's prohibition of discrimination in public accommodations has been in effect for nearly 75 years and is now codified in N. Y. Exec. Law § 296(2) (McKinney 1982).

their public accommodations statutes as to membership organizations generally open to the public. *Amici* have a direct and substantial interest in preserving their statutes, and therefore assert herein an interest as *amici curiae* in obtaining a reversal of the decision below.

STATEMENT OF THE CASE

Appellants are the officials of the State of Minnesota charged with enforcing that state's public accommodations statute, and appellee United States Jaycees (Jaycees) is a nationwide civic organization which excludes women as regular members.

After an administrative decision in Minnesota determined that Jaycees' membership policy violated Minnesota's public accommodations statute, the Jaycees initiated the instant proceeding by filing an action in federal district court, alleging that the state administrative decision violated the Jaycees' constitutional rights.

The district court requested a determination from the Minnesota Supreme Court as to whether Jaycees was subject to the state's public accommodations statute, and the Minnesota Supreme Court answered in the affirmative. *United States Jaycees v. McClure*, 305 N. W. 2d 764, 765 (Minn. 1981).

Thereafter, the district court rejected Jaycees' claim that its associational rights had been unconstitutionally abridged by the application of the public accommodations statute or that the statute was overbroad or void for vagueness. *United States Jaycees v. McClure*, 534 F. Supp. 766, 774 (D. Minn. 1982).

The Court of Appeals reversed, holding that Minnesota's public accommodations statute unconstitutionally interfered with the Jaycees' right of association and was

void for vagueness. *United States Jaycees v. McClure*, 509 F. 2d 1560, 1578 (8th Cir. 1983).

Appellants filed a timely notice of appeal and jurisdictional statement, invoking this Court's jurisdiction pursuant to 28 U. S. C. § 1254(2). For a further description of the parties herein, the opinions below, statement of the case, and jurisdiction, California adopts Appellants' jurisdictional statement.

SUMMARY OF ARGUMENT

Invidious discrimination against an entire class of persons solely on the basis of race, sex or other immutable characteristics, is not affirmatively protected by the Constitution. Freedom of association in furtherance of First Amendment interests is, of course, protected in many circumstances, but the right to associate does not include the right to discriminate when a group is otherwise open to the public.

The right of privacy may include a right to discriminate within one's home and intimate associations, but the right of privacy offers no protection to a membership group which is not truly private or selective and which only excludes applicants on a discriminatory basis.

Assuming, *arguendo*, any constitutional rights are abridged when a state requires nondiscriminatory membership policies for groups generally open to the public, the state's interest in promoting equal opportunity far outweighs any interference which may occur. Discrimination by public membership groups offends a national policy against discrimination, and harms both the individual who is denied membership and society as a whole.

A distinction between organizations generally open to the public and those which are truly private avoids

any constitutional difficulties in regulating discriminatory membership policies. A statute prohibiting discrimination may be construed so as not to apply to truly private groups, and such public/private distinction is based upon well established criteria and is not unconstitutionally vague.

ARGUMENT

I. The regulation of the discriminatory practices of a group generally open to the public does not offend any constitutional guarantees.

Minnesota, California, and other states, as well as the federal government, have determined that the public's interest in eliminating discrimination is sufficient to proscribe exclusionary practices of organizations which offer membership to the general public yet exclude an entire class of persons solely on a prohibited basis. The court below held, however, that "the law's interference with an organization's choice of its own members . . . [is] invalid under the First and Fourteenth Amendments." 709 F.2d at 1578-79. In so holding, the court below created a constitutionally protected right to discriminate which is totally unsupportable. While the right to associate in furtherance of First Amendment rights and the right to privacy are both well-established, these constitutional guarantees do not include any right to discriminate once a group opens its doors to the general public.

Freedom of association has, of course, been recognized as worthy of constitutional protection in numerous contexts.² However, the constitutional guarantees en-

²The right to associate in order to advocate beliefs or ideas is protected. *Anderson v. Celebrezze*, — U. S. —, [103 S. Ct. 1564, 1569] (1983); *Buckley v. Valeo*, 424 U. S. 1, 15 (1976);

(Continued on following page)

compassing the right to associate in furtherance of First Amendment rights have never included a constitutionally protected right to exclude an entire class of persons from a group otherwise open to the public, merely because of the race, sex or other immutable characteristics of that class. To the contrary, this Court has stated that such discrimination is not worthy of constitutional protection.

In *Norwood v. Harrison*, 413 U.S. 455 (1973), affirming the enjoining of a state program to loan textbooks to segregated schools, this Court rejected the claim that segregated private schools were entitled to any constitutional protection, saying:

“[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.” 413 U.S. at 469-70.

Similarly, in *Runyon v. McCrary*, 427 U.S. 160, 176 (1976), holding that 42 U.S.C. § 1981 prohibits private schools from denying admission on the basis of race, this Court quoted the language cited above in *Norwood v. Harrison* and distinguished between the protected First Amendment right to advocate segregated schools, and the asserted right to exclude students on the basis of race, rejecting the latter. The Court further noted that the

(Continued from previous page)

and *Healy v. James*, 408 U.S. 169, 181 (1972). The right to associate to seek legal redress is protected. *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217, 221-22 (1967); and *NAACP v. Button*, 371 U.S. 415, 430 (1963). And the right to maintain privacy in association in order to preserve the free exercise of First Amendment rights is protected. *Brown v. Socialist Workers*, — U.S. —, [103 S.Ct. 416, 423] (1982); and *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

discontinuance of the discriminatory admission practice was not shown to inhibit the exercise of protected advocacy rights. *See also Railway Mail Assn. v. Corsi*, 326 U. S. 88, 93-94 (1945) (labor organizations have no right to discriminate).

While language taken out of context from some cases may allude to a general right to discriminate in one's associations, these cases actually concern the right of privacy, and in no way establish any right to discriminate for groups generally open to the public. For example, *Griswold v. Connecticut*, 381 U. S. 479 (1965) established a right of marital privacy, and the discussion therein of protected forms of association must be read in light of the Court's description of "a relationship lying within the zone of privacy." 381 U. S. at 485. Similarly, Mr. Justice Goldberg's concurring opinion in *Bell v. Maryland*, 378 U. S. 226 (1964) also concerns rights of personal privacy, describing "the constitutional protection extended to *privacy* and *private* association." 378 U. S. at 313. Likewise, Mr. Justice Douglas, in his often quoted dissent in *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 179 (1972),³ described a "zone of privacy" with which the government may not interfere, and explained that this zone only extends to individuals or clubs described as "purely private." 407 U. S. at 179-80.⁴

³The majority holding in *Moose Lodge*, was, of course, that insufficient state action existed to subject a private club's discriminatory practices to the requirements of the Equal Protection Clause. *See also Junior Chamber of Commerce v. United States Jaycees*, 495 F. 2d 883, 887 (10th Cir. 1974), cert. denied 419 U. S. 1026; *Junior Chamber of Commerce v. Missouri State Jaycees*, 508 F. 2d 1031, 1033 (8th Cir. 1975); and *New York City Jaycees, Inc. v. United States Jaycees*, 512 F. 2d 856, 860 (2d Cir. 1975). These cases are irrelevant to the instant action.

⁴In a subsequent decision, the same club was, in fact, held to be subject to Pennsylvania's public accommodations statute

Where membership organizations are not "purely private" or exclusive in the selection of membership, but merely exclude an entire class of persons, these illusory selection procedures have been found to be unworthy of constitutional protection by both federal and state courts. In *Grove City College v. Bell*, 687 F.2d 684 (3rd Cir. 1982), cert. granted — U.S. — [103 S.Ct. 1181] (1983), in a decision upholding the applicability of Title IX of the Education Act of 1972, 20 U.S.C. § 1681, to sex discrimination in federally financed education programs, the court rejected the claim that first amendment associational rights were being infringed, saying:

"[T]he first amendment does not provide private individuals or institutions the right to engage in discrimination." 687 F.2d at 702.

Other federal laws regulating discrimination by public accommodations have also been held applicable to the discriminatory membership policies of allegedly private clubs which are, in fact, open to the public and only restrict membership on a prohibited basis.⁵ See, e.g., *Tillman v. Wheaton-Haven Recreational Assn. Inc.*, 410 U.S. 431, 438 (1973) (exclusionary policies of all-white club held unlawful because club had no plan or purpose of exclusiveness), and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969) (exclusionary policies also held

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because it was open to any Caucasian. *Commonwealth of Pennsylvania v. Loyal Order of Moose, Lodge No. 107*, 448 Pa. 451 [294 A.2d 594, 598] (1972), appeal dismissed for want of a substantial federal question, 409 U.S. 1052 (1972).

⁵While discrimination on the basis of sex is not prohibited by these federal laws, the fact that such statutes may be applied without offending any constitutional right to associate makes cases decided under these statutes relevant to the instant action. See Title II of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000a et seq., and 42 U.S.C. §§ 1981 and 1982.

unlawful, "there being no selective element other than race.")

As lower federal court decisions confirm, membership groups such as Jaycees which generally admit all applicants, excluding members only on an unlawful basis, are subject to these federal statutes. While the federal public accommodations statute, Title II of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000a *et seq.*, expressly exempts from coverage any "private club or other establishment not in fact open to the public", 42 U.S.C. § 2000a(e), groups which are not truly private enjoy neither statutory nor constitutional protection for discriminatory membership practices. *See, e.g., Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 311 n.6 (4th Cir. 1980) ("No proposed constitutional right of privacy could protect clubs which are not truly private. . . ."); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1336 (2d Cir. 1974); *Smith v. Young Men's Christian Assn.*, 462 F.2d 634, 648 (5th Cir. 1972); *Stout v. Young Men's Christian Assn.*, 404 F.2d 687, 688 (5th Cir. 1968); *Nesmith v. Young Men's Christian Assn.*, 397 F.2d 96, 101-102 (4th Cir. 1968); *United States v. Trustees of F.O.E.*, 472 F.Supp. 1174, 1175-76 (E.D. Wis. 1979); *United States v. Slidell Youth Football Assn.*, 387 F.Supp. 474, 485 (E.D. La. 1974); and *Wright v. Cork Club*, 315 F.Supp. 1143, 1151 (S.D. Tex. 1970).

Decisions under state public accommodations law have similarly distinguished between truly private clubs and those generally open to the public. For example, in *Curran v. Mount Diablo Council of the Boy Scouts of America*, the court rejected the claim that the "governing principle" found in the Douglas dissent in *Moose Lodge* precluded the application of California's Unruh Civil Rights Act to the Boy Scouts, saying:

"Taking this principle literally as 'governing' would afford protection to the most flagrant form of discrimination under the canopy of the right of free association. The answer is, of course, that those with a common interest may associate exclusively with whom they please *only* if it is the kind of association which was intended to be embraced within the protection afforded by the rights of privacy and free association. . . .

"Accordingly, these constitutional provisions only restrain the Legislature from enacting antidiscrimination laws where *strictly* private clubs or institutions are affected." 147 Cal. App. 3d 730-731.

Similarly, in *United States Power Squadrons v. State Human Rights Appeal Board*, 59 N. Y. 2d 401 [465 N. Y. S. 2d 871] (1983), the New York Court of Appeals rejected the argument that women could be excluded from a club which extended membership to all males who completed a basic course, saying:

"While private discrimination may be characterized as a form of freedom of association recognized under the [first] amendment, 'the constitution places no value on it' and petitioners are not entitled to affirmative protection to further their discriminatory practices (*Norwood v. Harrison*, 413 U.S. 455, 470, 93 S. Ct. 2804, 2813 (37 L. Ed. 2d 723)). . . . Though nominally private, they are not exempt from the provisions of the Human Rights Law if they are not in fact private except for purposes of discrimination. . . ." 59 N. Y. 2d at 414-15.

Other states have similarly applied their public accommodations statutes to eliminate membership discrimination by groups generally open to the public. For example, in *National Organization for Women v. Little League Baseball, Inc.*, 127 N. J. Super. 552 [318 A. 2d 33] (1974), *aff'd*, 67 N. J. 320 [338 A. 2d 198], a membership organization for boys was required to admit girls, pursuant to

New Jersey's public accommodations law. As the court stated:

"Little League is a *public* accommodation because the invitation is open to children in the community at large, with no restriction (other than sex) whatever." 318 A. 2d at 37-38.

In that case, as in the instant case, the male-only membership criteria was sought to be justified by references to the group's purposeful promotion of a specific ideology. This defense was rejected because there was no relationship between the goals of the group and the male-only membership restriction. As the court stated:

"Little League also points to the vaunted aims of the organization, mentioned in its federal charter, of development in children of 'qualities of citizenship, sportsmanship, and manhood,' and it implies these objectives will be impaired, in the case of the boys, by admission of girls to the activity. We are quite unable to understand how these conclusions are arrived at. Moreover, assuming 'manhood,' in the sense of the charter, means basically maturity of character, just as does 'womanhood,' we fail to discern how and why little girls are not as appropriate prospects for learning citizenship and sportsmanship, and developing character, as are boys." *Id.*, 318 A. 2d at 39.

See also Clover Hill Swimming Club v. Goldsboro, 47 N. J. 25 [219 A. 2d 161, 166] (1966) ("[I]n the selection of . . . members there can be no discrimination because of race."); and *Whispering Hills Country Club v. Kentucky*, 475 S. W. 2d 645 (Ct. App. Ky., 1972) (affirming order that club cease refusing to admit members because of race).⁶

⁶A few states have held that their public accommodations statutes do not cover discriminatory membership practices of clubs generally open to the public, but these decisions have been based upon interpretations of state statutes, and do not hold that such discriminatory practices are entitled to any con-

In sum, the conclusion of the court below that constitutional rights are infringed by a law prohibiting discriminatory membership policies in a club generally open to the public is wholly unsupportable. Private discrimination is not entitled to constitutional protection as an exercise of the right of association, and the application of Minnesota's public accommodations statute to the Jaycees offends no constitutional guarantees.

II. A state's interest in eliminating discrimination by groups generally open to the public is direct, substantial and compelling.

Assuming any constitutional rights are interfered with by a state's prohibition of discriminatory membership practices, the validity of the state's action can only be determined after the state's interest is balanced against the nature and degree of the intrusion. As described in *Anderson v. Celebrezze*, 103 S. Ct. at 1570, the analytical process the court is to employ is to identify, evaluate and weigh the countervailing interests.

Minnesota's public interest in enacting and preserving its public accommodations statute was set forth in its Supreme Court's opinion, which reviewed the history and public policy of the statute. California's Unruh Civil Rights Act is based upon a similar belief that discrimination is contrary to public policy. *Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 471 [20 Cal. Rptr. 609] (1962); and *Winchell v. English*, 62 Cal. App. 3d 125, 128 [133 Cal. Rptr. 20] (1976). Other states and the federal government have similarly determined that groups which

(Continued from previous page)

stitutional protection. See, e.g. *United States Jaycees v. Richardt*, 666 P. 2d 1008, 1012 (Alaska, 1983); *United States Jaycees v. Bloomfield*, 434 A. 2d 1379, 1381 (D. C. App., 1981); and *Schwenk v. Boy Scouts of America*, 275 Or. 327 [551 P. 2d 465, 469 n. 5] (1976).

are not strictly private should not be permitted to engage in discriminatory practices. It can scarcely be gainsaid that discrimination is contrary to the basic values of our society. *Bob Jones University v. United States*, — U.S. — [103 S. Ct. 2017, 2030] (1983).

Discrimination by membership organizations generally open to the public has been criticized in numerous commentaries as one of the final doors barring the equal opportunity of all persons to develop their talents and thus benefit society.

"Because prestigious clubs exert an enormous influence on our country's commercial and political life, the national commitment to equality of opportunity must override asserted interests in privacy and association." Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C. R.—C. L. L. Rev. 321, 324 (1983).

As the same writer concluded,

"[W]hen a private club, whose members are highly influential in government, business and the professions, flatly denies membership to an entire class of persons . . . our nation ultimately suffers. Denying women the right to associate in this context inhibits their professional advancement, and, in turn, restricts their contribution to society." *Id.*, at 407.

See also Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 13 Sw. U. L. Rev. 237, 271 (1982); and Hollingsworth, *Sex Discrimination in Private Clubs*, 29 Hastings L. J. 417, 442 (1977).

Given the substantial detriment discriminatory membership policies cause both to the excluded group and to society as a whole, the elimination of such discrimination is certainly a compelling state interest. This is particu-

larly true of civic organizations such as the Jaycees, an organization of over 300,000 members, whose avowed purpose is "to inculcate in the individual membership . . . a spirit of genuine Americanism and civic interest, . . . " 709 F.2d at 1562.

Measured against this substantial concern for equal opportunity for all, the Jaycees' interest in maintaining its male-only membership appears insignificant. While some of Jaycees' activities certainly are protected under the First Amendment, there is absolutely no showing that the male-only policy is necessary for, or even related to the pursuit of these interests. As the court below determined, "there is no evidence in this record that any particular man who wanted to be a member has ever been rejected." 709 F.2d at 1571. Since male applicants are not screened to select those whose beliefs and ideals are compatible with the Jaycees, and all women are excluded even though they may share Jaycees' concerns, the exclusionary policy in no way advances the Jaycees' First Amendment activities.

On balance, the state's concern for promoting equal opportunity for all persons, for the benefit of both the individual and society as a whole, vastly outweighs any legitimate interest of the Jaycees in maintaining a discriminatory membership policy.

III. The distinction between truly private clubs and those open to the general public is sufficiently specific to avoid unconstitutional vagueness.

In interpreting Minnesota's public accommodations statute, the Minnesota Supreme Court distinguished between public and private groups, and held that groups

without a restricted or selective membership are subject to the statute, while groups which are truly selective in membership are not. 305 N. W. 2d at 770-71. The court below held that this public/private distinction was "void for vagueness because it supplies no ascertainable standard for the inclusion of some groups as 'public' and the exclusion of others as 'private.'" 709 F. 2d at 1578. This holding ignores the long line of cases relied upon by the Minnesota Supreme Court which support its interpretation and which similarly distinguish between public and private groups according to the selectivity of the membership policy.

In *Tillman v. Wheaton-Haven Recreational Assn., Inc.*, and *Sullivan v. Little Hunting Park, Inc.*, the Supreme Court read a public/private distinction into 42 U. S. C. §§ 1981 and 1982. In *Sullivan*, the Court ruled that an allegedly private club was not truly private. As the Court explained,

"There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race." 396 U. S. at 236.

Similarly, in *Tillman*, a club was held not to be a truly private association since there was no actual selection except on the basis of race, despite formal approval requirements. 410 U. S. at 438. See also *Wright v. Salisbury Club, Ltd.*, 632 F. 2d at 312-13, where the court held that a club was not truly private because it did not follow a selective membership policy, it actively solicited members, and it served commercial interests.

As discussed above, the federal public accommodations statute includes a specific exemption for "a private

club or other establishment not in fact open to the public," 42 U. S. C. § 2000a(e), and cases interpreting this section have further developed the criteria adopted by the Minnesota Supreme Court to distinguish between public and private clubs. For example, in *Nesmith v. Young Men's Christian Assn.*, 397 F. 2d at 101-102, the court stated:

"In determining whether an establishment is in fact a private club, there is no single test. A number of variables must be examined in the light of the Act's clear purpose of protecting only 'the genuine privacy of private clubs . . . whose membership is genuinely selective'. . . . The YMCA, with no limits on its membership and with no standards for admissibility, is simply too obviously unselective in its membership policies to be adjudicated a private club."

Similar criteria as to the size and selectivity of membership were described in *Oleman v. Lake Hills Swim Club, Inc.*, 495 F. 2d at 1336; *United States v. Trustees of F. O. E.*, 472 F. Supp. at 1175-76; *United States v. Slidell Youth Football Assn.*, 387 F. Supp. at 485; and *Wright v. Cork Club*, 315 F. Supp. at 1151-52.

The public/private distinction was also read into California's Unruh Civil Rights Act in *Curran v. Mount Diablo Council of Boy Scouts*, 147 Cal. App. 3d at 731, where the court, explaining it was interpreting the Act so as to avoid constitutional difficulties, said:

"[C]onstitutional provisions only restrain the Legislature from enacting antidiscrimination laws where *strictly* private clubs or institutions are affected. . . . [¶] To avoid the unconstitutional infirmity argued by defendant, criteria have been established to determine, in the context of the Unruh Act and similar statutes, whether a group is private or public. . . ."

The Minnesota Supreme Court, like the California court in *Curran*, read into the state statute an exemption for clubs which are truly selective and private. This construction fully satisfies the need for specificity and avoids any constitutional difficulties which might be raised by a law which attempted to interfere with valid privacy rights.

The interpretation given the Minnesota statute by its Supreme Court negates any claim that the statute is void for vagueness. As described in *Buckley v. Valeo*, 434 U. S. at 77-78:

"Where the constitutional requirement of definiteness is at stake, . . . [courts] have the further obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness. *United States v. Harriss, supra*, [(1954) 347 U.S. 612] at 618; *United States v. Rumely*, [(1953)] 345 U.S. [41], at 45."

The Minnesota Supreme Court has construed its statute to avoid constitutional difficulties, and has read into its statute a public/private distinction identical to that previously read into 42 U. S. C. §§ 1981 and 1982 and written into the federal public accommodations statute when applied to membership organizations. The statute, as construed, is not unconstitutionally vague.

CONCLUSION

The Constitution does not protect invidious discrimination by organizations generally open to the public. To the contrary, such discrimination offends public policy, as it denies equal opportunity to the excluded individuals and deprives society of the services of these individuals.

Federal law and the laws of many states already prohibit discrimination by membership organizations which are not truly private, and, before the decision below, such laws have never been held to interfere with constitutional guarantees, so long as a distinction is made between public and private groups.

The decision of the Court of Appeals should be reversed either summarily or after full hearing before this Court, so that it will not impede efforts to eliminate discrimination.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General

MARIAN M. JOHNSTON
Deputy Attorney General

Counsel for Amicus Curiae
State of California

MOTION FILED

DEC 1 1983

No. 83-724

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, HUBERT H. HUMPHREY III,
and GEORGE A. BECK,

Appellants,

—v.—

THE UNITED STATES JAYCEES,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NA-
TIONAL ORGANIZATION FOR WOMEN, CONNECTICUT WOMEN'S
EDUCATIONAL AND LEGAL FUND, EQUAL RIGHTS ADVOCATES,
INC., WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK,
WOMEN'S LAW PROJECT, AND WOMEN'S LEGAL DEFENSE FUND
AS AMICI CURIAE IN SUPPORT OF APPELLANTS'
JURISDICTIONAL STATEMENT**

CHARLOTTE M. FISCHMAN
SCOTT D. HELLER
ABBE L. DIENSTAG
Kramer, Levin, Nessen,
Kamin & Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

MARSHA LEVICK
JUDITH I. AVNER
Counsel of Record
NOW Legal Defense and
Education Fund
132 West 43rd Street
New York, New York 10036
(212) 354-1225

Attorneys for Amici Curiae

No. 83-724

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1983

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IRENE GOMEZ-BETHKE, HUBERT H.
HUMPHREY III, and GEORGE A. BECK,
Appellants,
v.
THE UNITED STATES JAYCEES,
Appellee.

On Appeal from the United States
Court of Appeals for the Eighth Circuit

MOTION ON BEHALF OF THE NATIONAL
ORGANIZATION FOR WOMEN, CONNECTICUT
WOMEN'S EDUCATIONAL AND LEGAL FUND,
EQUAL RIGHTS ADVOCATES, INC., WOMEN'S
BAR ASSOCIATION OF THE STATE OF NEW
YORK, WOMEN'S LAW PROJECT, AND WO-
MEN'S LEGAL DEFENSE FUND FOR LEAVE TO
FILE BRIEF AMICI CURIAE

The National Organization for
Women and other amici respectfully move
this Court, pursuant to Rule 36, for
leave to file the accompanying brief
amici curiae in support of the jurisdic-

tional statement submitted by Appellants Irene Gomez-Bethke, Commissioner, Minnesota Department of Human Rights, Hubert H. Humphrey III, Attorney General of the State of Minnesota, and George A. Beck, Hearing Examiner for the State of Minnesota. Consent to file the attached brief has been sought from the parties. While the Appellants have consented, the United States Jaycees has not. It is therefore necessary to request the permission of this Court.

NATIONAL ORGANIZATION FOR WOMEN ("NOW") is a national membership organization of 200,000 women and men in over 750 chapters throughout the country dedicated to assuring equal economic, social and political opportunity for all women. Since its founding in 1967, NOW has been the largest feminist membership

organization dedicated to combatting sex discrimination and removing barriers to women's full participation in all aspects of American society. The Minnesota Chapter of NOW participated as amicus curiae in this case before the Minnesota Supreme Court and in the Eighth Circuit. NOW recognizes the importance of equal access for women to organizations like the United States Jaycees which provide leadership development and management skills and facilitate entry into a network of influential business and community leaders.

CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND ("CWEALF") is a non-profit public interest law firm specializing in cases of sex discrimination. Since its inception in 1975, CWEALF has represented women in numerous cases including those

seeking equal access to organizations with discriminatory membership policies. CWEALF has also been active in educating women about their legal rights.

EQUAL RIGHTS ADVOCATES, INC. is a San Francisco based, public interest legal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. Equal Rights Advocates, Inc. has been particularly concerned with gender equality in career development because economic equality is fundamental to women's ability to achieve equality in other aspects of society.

The WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK ("WBASNY") is a

membership organization of approximately 2,000 female and male attorneys, law graduates and law students committed to the advancement of women's rights. WBASNY cooperates with and aids and supports organizations and causes which advance the status and progress of women in society. Full access by women to decision making positions is one of its primary goals.

The WOMEN'S LAW PROJECT ("WLP") is a non-profit feminist law firm dedicated to eliminating sex discrimination through litigation and public education. Since its founding in 1973, the Women's Law Project has been concerned with institutional barriers to the advancement of women at all levels of participation in society. WLP has represented women seeking admission to all

male educational institutions and community organizations, and strongly believes that participation in such organizations is fundamental to the ability of women to compete equally in business and community life.

The WOMEN'S LEGAL DEFENSE FUND ("WLDF") is a non-profit, tax-exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, and public education. WLDF's experience and knowledge -- gained from its members who, as professionals, are

disadvantaged by discriminatory membership policies and from its clients who are similarly disadvantaged by exclusion from community and business organizations -- have demonstrated that such exclusionary policies result in a diminution of employment opportunities.

Amici believe that this Court's decision will be important to the countless number of women who find their career and business opportunities circumscribed by the pervasive exclusion of women from full membership in established business, professional, and community service organizations. The accompanying brief will assist the Court to understand the impact of such exclusions on the ability of women to compete equally with men in career advancement and development.

Although many of the organizations which relegate women to inferior membership status claim they do no harm because they are purely social or altruistic, in fact, like the United States Jaycees, these organizations are places where important exchanges among business and professional colleagues occur. Such organizations provide settings in which individuals pursuing career-related ventures have opportunities to display their talents and refine their skills. Amici are concerned that if women are denied equal access to these organizations, they will be denied access to a

traditional avenue of economic and political opportunity and advancement.

Respectfully submitted,

Marsha Levick
Judith I. Avner
Counsel of Record
NOW Legal Defense and
Education Fund
132 West 43rd Street
New York, New York 10036
(212) 354-1225

Charlotte M. Fischman
Scott D. Heller
Abbe L. Dienstag
Kramer, Levin, Nessen,
Kamin & Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for Amici Curiae

November 30, 1983

Charlotte M. Fischman
Scott D. Heller
Abbe L. Dienstag
Kramer, Levin, Nessen,
Kamin & Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for Amici Curiae

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IRENE GOMEZ-BETHKE, HUBERT H.
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Appellants,

v.

THE UNITED STATES JAYCEES,
Appellee.

On Appeal from the United States
Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ORGANIZATION FOR
WOMEN, CONNECTICUT WOMEN'S EDUCATIONAL
AND LEGAL FUND, EQUAL RIGHTS ADVOCATES,
INC., WOMEN'S BAR ASSOCIATION OF THE
STATE OF NEW YORK, WOMEN'S LAW PROJECT,
AND WOMEN'S LEGAL DEFENSE FUND AS AMICI
CURIAE IN SUPPORT OF APPELLANTS' JURIS-
DICTIONAL STATEMENT

Marsha Levick
Judith I. Avner
Counsel of Record
NOW Legal Defense and
Education Fund
132 West 43rd Street
New York, New York 10036
(212) 354-1225

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iii
Statement of the Case.....	1
Interest of <u>Amici</u>	5
Questions Presented.....	6
The Questions Are Substantial.....	8
I. THE EIGHTH CIRCUIT'S OPINION UPHOLDING THE UNITED STATES JAYCEES' DISCRIMINATORY MEMBERSHIP POLICY HAS A SUBSTANTIAL IMPACT ON THE ABILITY OF WOMEN ACROSS THE COUNTRY TO COMPETE EQUALLY WITH MEN IN BUSINESS AND CAREER ADVANCEMENT.....	8
II. THE EIGHTH CIRCUIT'S RUL- ING IS CONTRARY TO THE HOLDINGS OF THIS COURT THAT THERE IS NO CONSTI- TUTIONALLY PROTECTED RIGHT OF ASSOCIATION THAT SHIELDS PUBLIC GROUPS FROM STATE ANTI-DISCRIM- INATION LAWS.....	18
A. The constitutional right of freedom of association is lim- ited to groups that facilitate the exer- cise of First Amend- ment rights.....	21

B.	The Constitution does not immunize public enterprises from state anti-discrimination laws.....	25
C.	The Eighth Circuit has impaired the ability of the State of Minnesota to function in an area of vital local concern.....	32
III.	THE EIGHTH CIRCUIT ERRED IN HOLDING THAT THE MINNESOTA HUMAN RIGHTS ACT AS INTERPRETED BY THE STATE'S HIGHEST COURT IS UNCONSTITUTIONALLY VAGUE.....	37
	The Minnesota Supreme Court articulated clear standards for determining whether a civic organization falls within the state's Human Rights Act.....	38
	Conclusion.....	43

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Bates v. City of Little Rock,</u> 361 U.S. 516 (1960).....	21-22
<u>Bell v. Maryland,</u> 378 U.S. 226 (1964).....	26
<u>Buckley v. Valeo,</u> 424 U.S. 1 (1976).....	22
<u>Coates v. City of Cincinnati,</u> 402 U.S. 611 (1971).....	42
<u>Cornelius v. Benevolent Order</u> <u>of Elks,</u> 382 F. Supp. 1182 (D. Conn. 1974).....	27
<u>Daniel v. Paul,</u> 395 U.S. 298 (1969).....	27
<u>Fletcher v. United States Jay-</u> <u>cees,</u> Nos. 78-BPA-0058-0081 (Mass. Comm'n Against Dis- crimination Jan. 27, 1981).....	34n
<u>Fry v. United States,</u> 421 U.S. 542 (1975).....	33
<u>Giaccio v. Pennsylvania,</u> 382 U.S. 399 (1966).....	39

TABLE OF AUTHORITIES (Cont'd)

	<u>Page</u>
<u>Grayned v. City of Rockford,</u> 408 U.S. 104 (1972).....	40,41
<u>Heart of Atlanta Motel, Inc.</u> <u>v. United States,</u> 379 U.S. 241 (1964).....	25-26
<u>LeRoy Fibre Co. v. Chicago,</u> <u>Milwaukee, & St. Paul Rail-</u> <u>way Co.,</u> 232 U.S. 340 (1914)....	43
<u>Lochner v. New York,</u> 198 U.S. 45 (1905).....	25
<u>Minnesota v. United States</u> <u>Jaycees</u> (Minn. Dep't of Hu- man Rights Oct. 9, 1979).....	3,12n
<u>NAACP v. Alabama,</u> 357 U.S. 449 (1958).....	21
<u>NAACP v. Button,</u> 371 U.S. 415 (1963).....	21
<u>National League of Cities v.</u> <u>Usery,</u> 426 U.S. 833 (1976).....	33
<u>Nesmith v. YMCA,</u> 397 F.2d 96 (4th Cir. 1968).....	27
<u>New State Ice Co. v. Liebmann,</u> 285 U.S. 262 (1932).....	34-35
<u>Railroad Commission v. Pullman</u> <u>Co.,</u> 312 U.S. 496 (1941).....	32

TABLE OF AUTHORITIES (Cont'd)

	<u>Page</u>
<u>Runyon v. McCrary</u> , 427 U.S. 160 (1976).....	21,27
<u>Shelton v. Tucker</u> , 364 U.S. 479 (1960).....	22
<u>Sullivan v. Little Hunting Park</u> , 396 U.S. 229 (1969).....	27
<u>Tillman v. Wheaton-Haven Rec- reation Association</u> , 410 U.S. 431 (1973).....	27
<u>United States Jaycees v. Bloomfield</u> , 434 A.2d 1379 (D.C. 1981).....	34n
<u>United States Jaycees v. McClure</u> , 305 N.W.2d 764 (Minn. 1981).....	passim
<u>United States Jaycees v. McClure</u> , 534 F. Supp. 766 (D. Minn. 1982), <u>reversed</u> , 709 F.2d 1560 (8th Cir. 1983).....	passim
<u>United States Jaycees v. Richardet</u> , 666 P.2d 1008 (Alaska 1983).....	34n
<u>U.S. Power Squadron v. State Human Rights Appeal Board</u> , 59 N.Y.2d 401, 465 N.Y.S. 2d 871 (1983).....	27-29

TABLE OF AUTHORITIES (Cont'd)

	<u>Page</u>
<u>Village of Hoffman Estates v.</u> <u>Flipside, Hoffman Estates,</u> 455 U.S. 489 (1982).....	40-41
<u>Whalen v. Roe</u> , 429 U.S. 589 (1977).....	35
<u>Wright v. Cork Club</u> , 315 F. Supp. 1143 (S.D. Tex. 1970).....	27
<u>Younger v. Harris</u> , 401 U.S. 37 (1971).....	32-33

STATUTES AND CODES:

Minn. Stat. Ann. § 363.01(18) (West 1966 & Supp. 1983).....	2-3, 4, 38
Minn. Stat. Ann. § 363.03(3) (West 1966 & Supp. 1983).....	2,38
Minn. Stat. Ann. § 363.12(1)(3) (West 1966 & Supp. 1983).....	18-19
Minn. Stat. Ann. § 480.061(3) (West 1966 & Supp. 1983).....	4
N.Y. Admin. Code, tit. 9, part 1, sub. A, § 4.17.....	3n
Philadelphia Code § 20-307 (1981).....	3n

TABLE OF AUTHORITIES (Cont'd)

	<u>Page</u>
42 U.S.C. §§ 2000a to 2000a-6.....	25,33
42 U.S.C. §§ 2000e to 2000e-17....	33
 <u>OTHER AUTHORITIES:</u>	
Bartlett, Poulton-Callahan, Somers, <u>What's Holding Women Back?</u> , Management Weekly, Nov. 8, 1982.....	13
Brennan, <u>State Constitutions and the Protection of Indi- vidual Rights</u> , 90 Harv. L. Rev. 489 (1977).....	36
Catalyst Staff, <u>Making the Most of Your First Job</u> , (1981).....	13
Causey, <u>Old Girl Network Grow- ing</u> , Washington Post, Oct. 5, 1978, at C2, col. 1.....	15n
Editorial, <u>Dear Century Club</u> , N.Y. Times, Jan. 13, 1983, at A22, col. 1.....	14
410 Federal Personnel Manual 47 (1977).....	9n

TABLE OF AUTHORITIES (Cont'd)

	<u>Page</u>
Harragan, <u>Pull, How to get it, How to use it, How to keep it, Mademoiselle Magazine, Aug. 1982, at 192.....</u>	13
<u>Job Seeking Methods Used by American Workers, Bull. No. 1886, U.S. Bureau of Labor Statistics, Table 3 (1972).....</u>	14
Kiechel, <u>The Care and Feeding of Contacts, Fortune, Feb. 8, 1982, at 119.....</u>	14,15n
C. Kleiman, <u>Women's Network 2 (1980).....</u>	14
O'Brien, <u>Women Helping Women, Detroit Free Press, Nov. 13, 1978.....</u>	13,15n
Project, <u>Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215 (1978).....</u>	34
Raggi, <u>An Independent Right to Freedom of Association, 12 Harv. C.R.-C.L. L.Rev. 1 (1977).....</u>	22

TABLE OF AUTHORITIES (Cont'd)

	<u>Page</u>
Schweich, <u>No Women Wanted</u> , McCall's Magazine, May 1980, at 65.....	13
Simpson, <u>Jaycees Challenged on</u> <u>"Men Only" Rule</u> , Working Wo- man, Sept. 1979, at 61.....	10-11, 13
<u>The All Male Club: Threatened</u> <u>on All Sides</u> , Business Week, Aug. 11, 1980, at 90.....	11n
L. Tribe, <u>American Constitu-</u> <u>tional Law</u> , 700-03 (1978).....	22
U.S. Jaycees, <u>Service to Hu-</u> <u>manity: The Jaycee Future 2</u> (1969).....	16

STATEMENT OF THE CASE

The United States Jaycees (the "U.S. Jaycees" or "Jaycees") is a civic organization of some 300,000 members with numerous local chapters nationwide. The U.S. Jaycees refuses to admit women to full membership, according them only associate status.^{1/} The issues to be resolved in this case are whether application of the Minnesota Human Rights Act, prohibiting sex discrimination in places of public accommodation, to the Jaycees unconstitutionally interferes with the Jaycees' right of association and whether, as applied to the Jaycees, the Act is unconstitutionally vague.

Since 1974 and 1975, respectively, the Minneapolis and St. Paul

^{1/} Associate members are ineligible to vote, hold office or receive awards.

chapters of the Jaycees have admitted women as full members, in violation of the rules of the national organization. When the national organization threatened in 1978 to revoke the charters of these chapters, the chapters filed charges with the Minnesota Department of Human Rights claiming violation of the Minnesota Human Rights Act, Minn. Stat. Ann. §§ 363.01-363.14 (West 1966 & Supp. 1983).^{2/} Minn. Stat. Ann. §§ 363.03(3) (West 1966 & Supp. 1983) prohibits sex discrimination in places of public accommodation. Minn. Stat. Ann. § 363.01(18) (West 1966 & Supp. 1983) defines place of public accommodation to include "a business ... fa-

^{2/} A suit filed by the Jaycees in federal district court seeking declarative and injunctive relief against state interference with their organization was dismissed without prejudice pending the decision of the Minnesota Department of Human Rights.

cility of any kind ... whose goods ...
[and] privileges ... are ... sold or
otherwise made available to the public."

Hearing Examiner George Beck held in-depth hearings on the claims against the Jaycees and on October 9, 1979 issued a decision finding that the Jaycees was a place of public accommodation whose discriminatory practices violated the Minnesota Human Rights Act. The U.S. Jaycees was enjoined from revoking the local chapters' charters and from discriminating against any members or applicants for membership on the basis of sex. Minnesota v. United States Jaycees (Minn. Dep't of Human Rights Oct. 9, 1979) ("DHR Findings") (Appellants' Appendix at A-93).

The Jaycees then instituted an action in federal district court claim-

ing that application of the Minnesota Human Rights Act violated a constitutionally-protected right of freedom of association, and, subsequently, that the Minnesota statute was unconstitutionally vague. Under the procedure of Minn. Stat. Ann. § 480.061(3) (West 1966 & Supp. 1983), the district court certified to the Minnesota Supreme Court the question of whether the Jaycees was a place of public accommodation within the meaning of Minn. Stat. Ann. § 363.01(18). The Minnesota Supreme Court answered affirmatively. United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981). The district court then upheld the application of the Minnesota Human Rights Act to the Jaycees, finding that the state's compelling interest in prohibiting sex discrimination outweighed any associational rights of the Jaycees

and rejecting the Jaycees' vagueness claim. 534 F. Supp. 766 (D. Minn. 1982).

A divided panel of the Eighth Circuit, Chief Judge Lay dissenting, reversed and held that the Jaycees' right of association was violated by application of the Minnesota Human Rights Act and, in the alternative, that the Act was unconstitutionally vague as applied. 709 F.2d 1560 (8th Cir. 1983). A petition for rehearing en banc was rejected by an equally divided Eighth Circuit on August 1, 1983. (Appellants' Appendix at A-131). The appeal to this Court ensued.

INTEREST OF AMICI

The interest of the amici curiae is set forth in the motion accompanying this brief.

QUESTIONS PRESENTED

- I. May a federal court invoke the United States Constitution to invalidate the application of a Minnesota statute banning sex discrimination to a large, economically and socially influential civic organization that aggressively and indiscriminately solicits men between the ages of 18 and 35 as full members, but denies full membership to women? The court of appeals erroneously held that a right of freedom of association shields the discriminatory practices of such an organization even when the vast majority of the organization's activities are unconnected to any First Amendment exercise. This Court should reverse.

II. Is a Minnesota statute that bans sex discrimination in "a business ... facility of any kind ... whose goods ... [and] privileges ... are ... sold or otherwise made available to the public" void for vagueness, in its application by the highest court of the state to a large, economically and socially influential civic organization that discriminates against women? The court of appeals erroneously held that the application of the statute was void for vagueness because of the hypothetical difficulty that might arise in distinguishing the Jaycees organization from other organizations, not before the court, about whom the record was wholly undeveloped. This Court should reverse.

THE QUESTIONS ARE SUBSTANTIAL

I.

THE EIGHTH CIRCUIT'S OPINION UPHOLDING THE UNITED STATES JAYCEES' DISCRIMINATORY MEMBERSHIP POLICY HAS A SUBSTANTIAL IMPACT ON THE ABILITY OF WOMEN ACROSS THE COUNTRY TO COMPETE EQUALLY WITH MEN IN BUSINESS AND CAREER ADVANCEMENT

This case will determine whether the State of Minnesota can prohibit discrimination by the U.S. Jaycees, a national organization that operates a public business. When women are not offered equal access, when they are not welcomed as full members of such organizations, they are deprived of the advantages provided by the traditional avenues of self-development, economic and political opportunity, and advancement. Recent actions of several govern-

mental bodies^{3/} and organizations^{4/} reflect the growing public awareness of the importance of these service organizations to women's career advancement and full participation in the business and public life of the country.

3/ See, e.g., 410 Federal Personnel Manual 47 (1977) (federal personnel shall not participate in meetings held at facilities that discriminate on the basis of sex); Executive Order 17, State of New York (May 31, 1983), N.Y. Admin. Code, Tit. 9, part 1, sub. A, § 4.17 (state officials barred from conducting official business in sex discriminatory facilities); Philadelphia Code § 20-307 (1981) (no funds from Philadelphia Treasury may be used for business expenses arising from use of discriminatory facility).

4/ Organizations that have adopted policy statements prohibiting meetings at clubs with discriminatory membership policies include the American Bar Association (approved by its Board of Governors in October 1978); Association of the Bar of the City of N.Y. (approved April 9, 1981); American Jewish Congress (approved June 2, 1982).

The importance of such organizations is seen clearly in the operations of the U.S. Jaycees. Individuals join the Jaycees to enhance their career potential through leadership training opportunities and experience gained from running large-scale volunteer projects in an organization with high visibility and respect in the community. Local chapters are provided with materials for and implement programs in such areas as public speaking, personal dynamics, athletic championships and leadership training. Awards stimulate and grant recognition for achievement in these areas. The value of Jaycees' leadership training opportunities was summarized by John Kindrick, President of the Boston Jaycees who said, "My own value in the marketplace has increased dramatically by my Jaycee experience." Simpson, Jay-

cees Challenged on "Men Only" Rule,
Working Woman, Sept. 1979, at 61, 68.^{5/}

Women, even as associate members, cannot share fully in these programs. They are allowed and encouraged to work on Jaycees projects, but are denied the opportunity to lead the projects and are awarded no recognition for their work. Women are thus deprived of an important avenue for professional self-improvement, education, and recognition.

Jaycees members have high visibility in the community. At the national level, the U.S. Jaycees maintains

^{5/} One Minnesota woman who joined the Jaycees at her supervisor's request describes the organization as offering probably the best leadership training for women in the country. The All Male Club: Threatened on All Sides, Business Week, Aug. 11, 1980, at 90, 91.

a strong public image. Through sponsorship of various types of community projects at the chapter level, members of the Jaycees enhance their status in their local communities and make useful acquaintances within the local power structure.^{6/} Women need this kind of exposure if they are to equal the professional achievements of their male counterparts.

Women also seek full membership in the U.S. Jaycees because of the network of business contacts and opportunities that the Jaycees offers. See

^{6/} Projects sponsored by the U.S. Jaycees include a CPR training program which is open to the public and a program in government affairs. DHR Findings Nos. 19, 20, Appellants' Appendix at A-103. In Minnesota, locally developed projects include an annual free Christmas dinner and the Patty Berg Gold Clinic. DHR Finding No. 20, Appellants' Appendix at A-104.

Schweich, No Women Wanted, McCall's Magazine, May 1980, at 65. See also Simpson, Jaycees Challenged on "Men Only" Rule, Working Woman, Sept. 1979, at 61. Networks have been described as "where the power really is ... the mechanism that gives men a chance to push the right buttons and meet the right people at the right time," O'Brien, Women Helping Women, Detroit Free Press, Nov. 13, 1978. Access to networks and contacts is an important factor in the difference in success between male and female managers. See Catalyst Staff, Making the Most of Your First Job (1981); Harragan, Pull, How to get it, How to use it, How to keep it, Mademoiselle Magazine, August 1982, at 192, 193; Bartlett, Poulton-Callahan, Somers, What's Holding Women Back?, Management Weekly, Nov. 8. 1982; See

also Editorial, Dear Century Club, N.Y. Times, Jan. 13, 1983, at A22, col. 1.

The importance of contacts is understandable. Contacts are a major source of productive job placement leads. According to the United States Bureau of Labor Statistics, almost one-third of all jobs held by males come through personal contacts. Job Seeking Methods Used by American Workers, Bull. No. 1886, U.S. Bureau of Labor Statistics, Table 3 (1972). Many people believe the percentage is actually higher for high-level jobs. C. Kleiman, Women's Network 2 (1980). See also, Kiechel, The Care and Feeding of Contacts, Fortune, Feb. 8, 1982, at 119. Entrée into the "Old Boys' Network" -- that series of linkages with influential elders, ambitious peers and younger men on their way up which men develop as

they move through school, work, professional and community service organizations, and private clubs -- provides men with knowledgeable allies who help them advance in their careers.^{7/}

Every man who joins the U.S. Jaycees automatically becomes a member of an extensive and influential network which includes current members, alumni of the organization and non-member civic leaders who work closely with the U.S. Jaycees on community projects. Jaycee

^{7/} For example, a corporation vice president in Minnesota, after a long peroration on how little contacts meant to him and his associates, said "Well, of course, it is true that in 15 minutes in the lobby of the Minneapolis Club you can see everybody you need to talk to in a week." Kiechel, The Care and Feeding of Contacts, Fortune, Feb. 8, 1982, at 119. See O'Brien, Women Helping Women, Detroit Free Press, Nov. 13, 1978; Causey, Old Girl Network Growing, Washington Post, Oct. 5, 1978, at C2, col. 1.

members have numerous opportunities to know and work with individuals from their peer group in the community. The age range of the Jaycees' membership (18-35) provides members with a chance to meet both ambitious peers with similar career goals, and senior members, slightly older, who can offer advice and information and serve as role models. Many of the Jaycees graduates, to whom members have access, hold influential positions in business and politics. As the Jaycees itself points out, "numerous past Jaycees are members of the Senate and the House of Representatives, as well as state legislatures" U.S. Jaycees, Service to Humanity: The Jaycee Future 2 (1969). Women are deprived of these contacts.

The U.S. Jaycees chooses to accord women "associate member" status

rather than to bar them entirely. This in no way ameliorates the harm women suffer. Denied full membership privileges -- the right to run for office, vote in elections or receive awards -- women members are branded as second-class citizens and treated accordingly. No matter how competent and active in the organization, the female Jaycee is deprived of an equal opportunity to improve her leadership skills, to distinguish herself, to develop necessary contacts, and to reap equally the rewards of organization, participation and involvement.

II.

THE EIGHTH CIRCUIT'S RULING IS
CONTRARY TO THE HOLDINGS OF
THIS COURT THAT THERE IS NO
CONSTITUTIONALLY PROTECTED
RIGHT OF ASSOCIATION THAT
SHIELDS PUBLIC GROUPS FROM
STATE ANTI-DISCRIMINATION LAWS

By recognizing a right to freedom of association that goes beyond any constitutionally protected interests that have been recognized by this Court, the Eighth Circuit has prevented the State of Minnesota from eliminating sex discrimination in large, publicly oriented civic organizations operating within the state. Minnesota has a strong policy, expressed in its legislative and judicial pronouncements, against all forms of sex discrimination in the public domain. See Minn. Stat. Ann. § 363.12(1) (3) (West 1966 & Supp. 1983) ("It is the public policy of this state to secure for persons in this state, freedom from

discrimination; In public accommodations because of ... sex"). The Minnesota Supreme Court has determined that the Jaycees is a public organization under state law, noting that the Jaycees engages in aggressive, unselective recruitment of men ages 18 to 35, that the national organization views its members as customers of the leadership and personality training offered by the organization, and that the leadership experience and opportunity to make personal contacts facilitated by full membership in the Jaycees provides a competitive edge recognized in the business community.

Notwithstanding the findings and conclusions of the Minnesota Department of Human Rights, the Minnesota Supreme Court, and the federal district court, the Eighth Circuit has concluded

that the state is constitutionally constrained to tolerate the discriminatory practices of the Jaycees. The court of appeals found this organization of approximately 300,000 members in 7,400 local chapters across the country, a "private group" in need of constitutional protection. The court virtually ignored the recruiting, leadership training, civic functions and events which the prior tribunals had found to predominate among the activities of the Jaycees organization. Instead the court saw the Jaycees as a group whose charter preached the "brotherhood of man" and whose character would be dramatically altered were women to become full members. The Eighth Circuit canvassed this Court's jurisprudence on the freedom of association, announced that it would not be bound by it, and proceeded to fashion

an associational right that would protect sex discrimination among the Jaycees. This decision should be reversed.

- A. The constitutional right of freedom of association is limited to groups that facilitate the exercise of First Amendment rights.
-

This Court has formulated a right of association to facilitate the exercise of the textually explicit First Amendment rights. The limitation on the scope of this right is apparent in the cases. NAACP v. Alabama, 357 U.S. 449, 460 (1958), spoke of the right "to engage in association for the advancement of beliefs and ideas," a formulation reaffirmed in NAACP v. Button, 371 U.S. 415, 430 (1963), and Runyon v. McCrary, 427 U.S. 160, 175 (1976). Bates v. City of Little Rock, 361 U.S. 516, 523 (1960), discussed a "freedom of associa-

tion for the purpose of advancing ideas and airing grievances," while Shelton v. Tucker, 364 U.S. 479, 486 (1960), described freedom of association as "a right closely allied to freedom of speech." More recently Buckley v. Valeo, 424 U.S. 1, 22 (1976), found the constitutional significance of association in "amplifying the voice of [the association's] adherents." See also Raggi, An Independent Right to Freedom of Association, 12 Harv. C.R.-C.L. L. Rev. 1 (1977); L. Tribe, American Constitutional Law 700-03 (1978).

The Jaycees is not protected by the associational right embodied in these cases. As the record demonstrates, the organization is geared towards developing qualities of leadership, responsibility, and civic sophistication in its members. These activi-

ties lie outside the First Amendment, and their exercise in groups does not implicate a freedom of association.

It is true, as the Eighth Circuit recites, that the Jaycees over the years has occasionally taken positions on various political topics. So have labor groups and business organizations. It is absurd, however, to maintain that the political pronouncement of an otherwise economically and socially oriented entity could shield it from the reach of anti-discrimination laws. Otherwise, virtually all anti-discrimination laws, both state and federal, could be evaded simply by issuing a few statements on public affairs.

The Eighth Circuit, apparently recognizing that the Supreme Court's cases on freedom of association afford

questionable protection for the Jaycees, has fashioned an associational right untethered to First Amendment moorings. Announcing that "[its] decision is not controlled by precedent," 709 F.2d at 1576, the court of appeals has created a "species of association" that is broader than the explicit rights guaranteed by the First Amendment and is based on the "nebulous concept of substantive due process." 709 F.2d at 1568. In so doing, the Eighth Circuit has returned to the discredited era of Lochner v. New York, 198 U.S. 45 (1905), when progressive social legislation in the states was invalidated under the heading of substantive due process. The Eighth Circuit's decision has again cast the Constitution as an impediment to social progress in the states. The court of appeals has invoked substantive due

process to allow the Jaycees to flout state policy and perpetuate its practice of sex discrimination.

This Court should correct the Eighth Circuit's distortion of the doctrine of freedom of association so that the State of Minnesota may apply its Human Rights Act to the Jaycees.

- B. The Constitution does not immunize public enterprises from state anti-discrimination laws.

This Court has held that the Constitution provides no safe harbor against the application of civil rights laws for enterprises operating in the public domain. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), a case upholding the constitutionality of the federal public accommodation statute, 42 U.S.C. § 2000a, the Court noted:

[N]o case has been cited to us where the attack on a state [public accommodation] statute has been successful, either in federal or state courts [T]he constitutionality of such state statutes stands unquestioned.

379 U.S. at 260. These statutes remained unquestioned until the decision in this case, the first instance in which a federal court has found a state public accommodation statute unconstitutional. See also Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) ("[A] claim of equal access to public accommodations ... is not a claim which significantly impinges upon personal associational interests.")

The analytic tools for distinguishing public from private entities are neither novel nor elusive. The principal focus of the criteria has clearly been on an organization's mem-

bership practices. Among the criteria are selectivity of the group in the admission of members, Tillman v. Wheaton - Haven Recreation Association, 410 U.S. 431, 438 (1973); Sullivan v. Little Hunting Park, 396 U.S. 229, 236 (1969); existence of limits on the size of membership; Nesmith v. YMCA, 397 F.2d 96, 102 (4th Cir. 1968), formality of membership procedures; Cornelius v. Benevolent Order of Elks, 382 F. Supp. 1182, 1203 (D. Conn. 1974); Wright v. Cork Club, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970), attributes of self-government and member ownership; Daniel v. Paul, 395 U.S. 298, 301 (1969), and the existence of advertising directed to non-members; Runyon v. McCrary, 427 U.S. 160, 172 n.10 (1976).

A recent unanimous decision of the New York Court of Appeals, U.S. Pow-

er Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 465 N.Y.S.2d 871 (1983) employed many of these factors to find an organization of power boating enthusiasts subject to the state's laws against sex discrimination. Like the Jaycees, the Power Squadrons offered social, civic, and educational programs. The court noted that the group "had no plan or purpose of exclusivity other than sexual discrimination ... encourage[d] and solicit[ed] public participation in their programs, courses and membership ... [and did not] direct publicity exclusively and only to the members" 59 N.Y.2d at 413, 465 N.Y.S.2d at 877. A challenge to the constitutionality of the state civil rights law as applied to the Power Squadrons was summarily dismissed with the observation that "the

constitution places no value on [private discrimination].'" 59 N.Y.2d at 413, 465 N.Y.S.2d at 877, quoting, Norwood v. Harrison, 413 U.S. 455, 469 (1973).

Employing this same approach, the Minnesota Supreme Court and the district court found the Jaycees to be a public organization for the purposes of state and federal law. These conclusions were amply supported by the record. Members are referred to as "customers" and membership in the organization is referred to as "the product" or "the goods" in the organization's published material. Moreover, the sale of memberships occupies a tremendous amount of officers' time and recruitment achievement is recognized in the organization's awards system -- more than half of which deal with "record breaking performance in selling memberships."

United States Jaycees v. McClure, 305 N.W.2d 764, 771 (Minn. 1981). There are no published criteria by which members are selected, and no evidence in the record that any applicant for membership has ever been rejected -- except women applying for "full" membership rather than "associate" membership.

The court of appeals chose to depart from these accepted criteria for determining the public nature of an organization and substituted an analysis of the Jaycees' ideological goals, as distilled from the organization's charter. The court regarded the espousal of "faith in God," "free enterprise," and the "brotherhood of man [that] transcends the sovereignty of nations" as the key to the character of the Jaycee organization. 709 F.2d at 1570. Curiously, the Eighth Circuit found that these

noble creeds permeate all the Jaycees' activities, from its civil and business functions to its leadership training seminars. The Eighth Circuit made these findings despite recruitment literature that loudly announces "JAYCEES, THE PRODUCT you are selling, is outstanding from any angle. Jaycees is the 'best value' you can get." United States Jaycees v. McClure, 305 N.W.2d at 769, quoting, The Jaycees Recruitment Manual (emphasis in original). Not only is the court of appeals' "conception of the Jaycees ... based upon factual error." 709 F.2d at 1579-80 (Lay, C.J., dissenting), but the court has impermissibly substituted its judgment for the 'reasonable judgment of the state. The Supreme Court should reverse.

- C. The Eighth Circuit has impaired the ability of the State of Minnesota to function in an area of vital local concern.

A more restricted view of the constitutional right of freedom of association in this case is appropriate to prevent the federal government from encroaching on state powers and prerogatives. This Court has long been sensitive to those aspects of our federal system which require the national government to tread carefully when called upon to interfere with state functions. See Railroad Commission v. Pullman Co., 312 U.S. 496, 498 (1941) (recognizing "sensitive area[s] of social policy upon which the federal courts ought not to enter" absent pressing exigency); Younger v. Harris, 401 U.S. 37, 44 (1971), (emphasizing "the notion of comity, that is a proper respect for

state functions"); National League of Cities v. Usery, 426 U.S. 833, 843 (1976), quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (federal government "may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system").

This is not an instance in which a state has chosen to flout overriding federal law or policy. Congress has forbidden discrimination on the bases of race, religion, color, and national origin in places of public accommodations, 42 U.S.C. §§ 2000a to 2000a-6, and discrimination, including sex discrimination, in places of employment, 42 U.S.C. §§ 2000e to 2000e-17. Many states, however, have chosen to go further. At least thirty-eight states and the District of Columbia have public

accommodation laws and more than half of these prohibit sex discrimination. Project, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215, 292-93 (1978).^{8/}

The wisdom of allowing the states a free hand to legislate where national policy has not crystalized has been captured in the oft-quoted remarks of Justice Brandeis:

^{8/} Like the tribunals in Minnesota, the Massachusetts Commission Against Discrimination has held the Jaycees subject to public accommodations laws in that state. See Fletcher v. United States Jaycees, Nos. 78-BPA-0058-0081 (Mass. Comm'n Against Discrimination Jan. 27, 1981). A contrary result was reached in United States Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983) (reversing lower court); United States Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. 1981) (reversing lower court).

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also Whalen v. Roe, 429 U.S. 589, 597 & n.20 (1977) ("[W]e have frequently recognized that individual states have broad latitude in experimenting with possible solutions to problems of vital local concern.").

Amici submit that there would be no risks and many benefits to this country if Congress were to formulate public accommodation laws forbidding sex discrimination in open, civically and economically influential organizations such as the Jaycees. In the absence of a national commitment, however, the

states that choose to stand in the breach should not be discouraged by the federal judiciary from doing so. As a member of this Court has noted:

State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law -- for without it, the full realization of our liberties cannot be guaranteed.

Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977). The obstacles which the Eighth Circuit has erected to prevent Minnesota law from promoting sexual equality in the state's communities and marketplaces must be removed if the state is to fulfil this vision.

III.

THE EIGHTH CIRCUIT ERRED IN
HOLDING THAT THE MINNESOTA
HUMAN RIGHTS ACT AS INTERPRETED
BY THE STATE'S HIGHEST COURT IS
UNCONSTITUTIONALLY VAGUE

The Eighth Circuit has also invalidated the Minnesota Human Rights Act as applied to the Jaycees because, in its view, the state court "introduced such an element of uncertainty [into the statute] as to make it impossible for people of common intelligence to know whether their organizations are subject to the law or not." 709 F. 2d at 1577. This vagueness analysis erroneously invalidated an otherwise unobjectionable statute, on account of one dictum in a carefully reasoned interpretation of the statute by the state's highest court. Because the Eighth Circuit has perverted Supreme Court doctrine and confused vagueness with the inevitable

imprecision of legislative drafting and judicial interpretation, this Court should reverse.

The Minnesota Supreme Court articulated clear standards for determining whether a civic organization falls within the state's Human Rights Act.

The Minnesota Human Rights Act, which forbids sex discrimination in places of public accommodation, Minn. Stat. Ann. § 363.03(3) (West 1966 & Supp. 1983), defines public accommodation to include "a business ... facility of any kind ... whose goods ... [and] privileges ... are ... sold, or otherwise made available to the public." Minn. Stat. Ann. § 363.01(18) (West 1966 & Supp. 1983). The Minnesota Supreme Court determined that the Jaycees organization is a business "in that it sells goods and extends privileges in exchange for membership dues;" that it

is a public business in that it "solicits and recruits dues paying members but is unselective in admitting them;" and that it is a public business facility "in that it continuously recruits and sells memberships at sites within the State of Minnesota." United States Jaycees v. McClure, 305 N.W.2d 764, 768 (Minn. 1981). In its decision the Minnesota Supreme Court focused on the panoply of training programs offered by the Jaycees to its members in order to enhance the members' professional prospects and on the organization's aggressive, non-selective recruitment practices. Given the court's careful analysis, it can hardly be said that the decision has left the Minnesota statute "vague and standardless." Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966).

With the criteria announced by the Minnesota Supreme Court, the Minnesota public accommodations law as applied to civic organizations is neither "a trap [for] the innocent by not providing fair warning," nor flawed by failure to "provide explicit standards" for the law's application. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982), quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). So long as the Minnesota Supreme Court's interpretation of the statute is given only prospective reach against the Jaycees, who are free to comply or cease operations within the state, the Jaycees cannot claim failure to warn. The organization now knows it is covered. The carefully reasoned opinion of the Minnesota court convincingly demonstrates that the court has

not arbitrarily brought the Jaycees within the scope of the Minnesota Human Rights Act, but has rendered an interpretation of the statute consistent with the intent of the statutory framers and within the mainstream of Minnesota civil rights law. A federal court must consider the state court's decision with a view towards upholding the state statute. See Grayned v. City of Rockford, 408 U.S. at 110; Flipside, Hoffman Estates, 455 U.S. at 494 n.5. Had the Eighth Circuit done so, it would have found that the state court decision clarifies rather than obfuscates the law.

The Eighth Circuit was inexplicably troubled by dictum in the state court opinion that distinguished the Jaycees and another organization not before the court. United States Jaycees

v. McClure, 305 N.W.2d at 771. Without explanation, the Minnesota Supreme Court stated that the Jaycees was not "analogous[] to private organizations such as the Kiwanis International Organization." The dictum of the Minnesota Supreme Court merely reflects possible difficulties in applying statutes to marginal cases. It may be that there are civic organizations that fall so close to the public-private line that it will be difficult to ascertain whether they are within the reach of the public accommodation law. A statute, however, continues to provide a "comprehensible normative standard" even when it is marginally imprecise. See Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). That the law must struggle with differences of degree is not cause for invalidating a statute. As Justice

Holmes observed in LeRoy Fibre Co. v. Chicago, Milwaukee, & St. Paul Railway Co., 232 U.S. 340, 354 (1914) (Holmes, J., concurring in part and dissenting in part), "[t]he whole law [depends on differences of degree] as soon as it is civilized." Having failed to appreciate these principles, the Eighth Circuit has spawned an approach to the vagueness doctrine that threatens the accustomed interplay of the states' legislative and judicial branches. Accordingly, the Supreme Court should reverse.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of

this Appeal and reverse the decision of
the court of appeals.

Respectfully submitted,

Marsha Levick
Judith I. Avner
Counsel of Record
NOW Legal Defense and
Education Fund
132 West 43rd Street
New York, New York 10036
(212) 354-1225

Charlotte M. Fischman
Scott D. Heller
Abbe L. Dienstag
Kramer, Levin, Nessen,
Kamin & Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for Amici Curiae*

November 30, 1983

* Attorneys for the Amici Curiae gratefully acknowledge the assistance of Lisa Davis in the preparation of this brief.

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No. 83-724

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY III, Attorney General
of the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of
itself and its qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF NORTHWESTERN BELL
TELEPHONE COMPANY AS AMICUS CURIAE
IN SUPPORT OF APPELLANTS'
JURISDICTIONAL STATEMENT**

JAMES A. GALLAGHER
General Attorney
Northwestern Bell Telephone
Company
200 South Fifth Street
Room 1800
Minneapolis, MN 55402
Telephone: (612) 344-5689
Attorney for Amicus Curiae

December 1, 1983

Of Counsel:
MARY FERGUSON LaFAVE
Attorney
Northwestern Bell Telephone
Company

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ON APPEAL FROM THE UNITED STATES
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MOTION OF NORTHWESTERN BELL TELEPHONE COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Northwestern Bell Telephone Company ("NWB") respectfully moves this Court, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of Appellants' Jurisdictional Statement.

NWB has developed and vigorously applies its Affirmative Action Program to secure equality between all its employees in the work environment. The State of Minnesota has enacted a comprehensive statute designed to eliminate discrimination by, *e.g.*, places of public accommodation such as the U.S. Jaycees.

The U.S. Jaycees relegates women members to a position different from and inferior to men. The sex-based membership policies of the U.S. Jaycees, a national business organization, thwart the efforts of both NWB and the State of Minnesota to eliminate discrimination in the total work environment. NWB will demonstrate to this Court that the U.S. Jaycees offers each full member an effective means to develop valuable business skills and contacts which add to and complement the training provided by NWB. Such enrichments facilitate the career development of NWB employees.

The instant appeal provides this Court with an opportunity to foster equal opportunity for career advancement. NWB, as an *amicus curiae*, can assist the Court in understanding the value of equal membership rights in the U.S. Jaycees and the need to eradicate discrimination in such places of public accommodation.

For so long as the U.S. Jaycees, an esteemed business organization, discriminates against women in its ranks, equal opportunity for positions of leadership and advancement in employment will not be achieved.

Respectfully submitted,

JAMES A. GALLAGHER

General Attorney

Northwestern Bell

Telephone Company

200 South Fifth Street

Room 1800

Minneapolis, MN 55402

Telephone: (612) 344-5689

Attorney for Amicus Curiae

December 1, 1983

Of Counsel:

MARY FERGUSON LaFAVE

Attorney

Northwestern Bell Telephone

Company

TABLE OF CONTENTS

	Page
Table of Authorities	i
Interest of Amicus Curiae	2
The Issues Are Substantial	5
Argument	7
The State's Compelling Interest in Securing for Women the Same Benefits Afforded to Men by a Place of Public Accommodation Outweighs Any Allegations that the State's Statute, Designed to Further this Goal, Impermissibly Infringes on Constitutional Rights of the Jaycees	7
Conclusion	11

TABLE OF AUTHORITIES

Federal Cases:

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)	5
Buckley v. Valeo, 424 U.S. 1 (1976)	8
NAACP v. Alabama, 357 U.S. 449 (1958)	9
NAACP v. Button, 371 U.S. 415 (1963)	7, 8
Railway Mail Ass'n. v. Corsi, 326 U.S. 88 (1945)	5
Runyon v. McCrary, 427 U.S. 160 (1976)	5, 9, 10
United Mine Workers v. Illinois State Bar Ass'n., 389 U.S. 217 (1967)	7, 9

	Page
United States Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983)	2, <i>passim</i>
United States Jaycees v. McClure, 534 F.Supp. 766 (D. Minn. 1982)	2, <i>passim</i>
Winters v. New York, 333 U.S. 507 (1948)	7
 Minnesota Cases:	
United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981)	5
 United States Constitution:	
First Amendment	<i>passim</i>
Fourteenth Amendment	5
 Minnesota Statutes:	
Minn. Stat. § 363.01 (1982)	5
Minn. Stat. § 363.01(18) (1980)	5, 6, 7
Minn. Stat. § 363.01(18) (1982)	6
Minn. Stat. § 363.03(3) (1982)	6
 Federal Regulations:	
41 C.F.R. § 60-1.11 (1981)	4
46 Fed. Reg. 18951 (1981)	4
 Law Reviews:	
MURRAY & EASTWOOD, <i>Jane Crow & the Law:</i>	
<i>Sex Discrimination & Title VII,</i>	
34 Geo. Wash. L.Rev. 232 (1965)	6

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INTEREST OF THE AMICUS CURIAE

Northwestern Bell Telephone Company ("NWB" or "Company") is an Iowa corporation authorized to and conducting the business of providing telecommunications services in five states, including the State of Minnesota. Many of its employees belong to local chapters of the U.S. Jaycees located throughout the State of Minnesota.

The U.S. Jaycees ("Jaycees") actively seeks women members, "but relegates them to inferior positions within the organization." *United States Jaycees v. McClure*, 709 F.2d 1560, 1580 (8th Cir. 1983) (dissenting opinion). As associate members, women may not hold office at the local, state and national levels, vote or receive awards. *Id.* In sharp contrast, men, ages 18 to 35, may be individual members with full membership rights. No limits are placed on an individual member's participation in the Jaycees.

In 1974, the Minneapolis and St. Paul chapters of the Jaycees rejected the Jaycees' sex-based membership distinction. These chapters permitted women to become individual members. Consequently, the Jaycees sought to revoke the charters of the Minneapolis and St. Paul chapters for failure to mirror its sex-based membership classifications. *United States Jaycees v. McClure*, 534 F. Supp 766 (D. Minn. 1982). Absent action by this Court, the Jaycees will be permitted to continue discrimination on the basis of sex within its membership because the Eighth Circuit Court of Appeals found that Minnesota's statute, designed to eliminate such discrimination by places of public accommodation, violated the Jaycees' constitutional right of association and was void for vagueness. 709 F.2d at 1561.

NWB's interest in this action is substantial. While this interest cannot be compellingly translated into a financial

stake, it represents a concern—the elimination of discrimination—which permeates NWB's fundamental tenets concerning the conduct of its business and improvement of its employees' quality of work life which have been carefully developed and assiduously applied.

NWB maintains and vigorously fosters its Affirmative Action Program. This program is designed to eliminate discrimination in the workplace and to promote uniformly the welfare and development of each individual to his or her maximum potential.

NWB recognizes, however, that many non-Company activities and entities can complement and add a different and positive dimension to its employees' growth. Consequently, it promotes membership of its employees in organizations such as the Jaycees.

As set forth on its own letterhead, the United States Jaycees is "a leadership training organization." This same principle is carried out at the state and local levels. The Minneapolis Jaycees' motto is "Individual Development through Community Service." "The central purpose [of the Jaycees] is . . . to learn the techniques and skills and to form the acquaintances that will serve as a basis for leadership positions today and tomorrow." *Id.* at 1583 (separate opinion). This purpose is accomplished by members' actively soliciting new members and chairing various activities. The latter requires managing and disbursing large amounts of money and overseeing and coordinating a substantial number of volunteers. To encourage active participation in its program, the Jaycees gives awards to its members who, *e.g.*, generate the most new members.

Such tangible benefits, however, are denied to women as associate members. Due to the Court of Appeals' holding,

women in Minnesota chapters will not be allowed to vote, hold office or receive awards. This will effectively deny them the right to reap many of the benefits heralded by the Jaycees.

That NWB values the benefits provided to its employees by membership in the Jaycees is underscored by the fact that NWB pays the dues for many of its employees in that organization.¹ A female NWB employee served as President of the Minneapolis Chapter of the Jaycees during the period June 1981 to June 1982. In this connection, NWB subsidized and encouraged her outside duties with the Jaycees by permitting her to devote approximately 50 percent of her time to Jaycees' activities. During her tenure, she received full pay, and NWB provided administrative and clerical support at a relatively substantial cost. Both NWB and its employee reaped significant benefits from her serving as President of the Minneapolis Jaycees. Because of holding that position, she automatically sat on the Board of Directors of three prominent Minneapolis concerns including the Chamber of Commerce. Such visibility and responsibility stimulated her management and leadership development, the benefits of which flowed directly to NWB.

¹ It should be noted that the Office of Federal Contract Compliance Programs promulgated and published regulations which would severely restrict a contractor, including NWB, from paying membership dues or other expenses of its employees who participate in a private club or organization which bars, restricts or limits its membership on the basis of race, color, sex, religion or national origin. 41 C.F.R. § 60-1.11 (1981). The effective date of this regulation has been deferred until further notice. 46 *Fed. Reg.* 18951 (1981). However, the regulation clearly evidences that the concern about membership discrimination in organizations such as the Jaycees exists at the federal level; Minnesota is merely on the leading edge of governmental bodies attempting to eliminate discrimination in such organizations.

THE ISSUES ARE SUBSTANTIAL

Elimination of discrimination in Minnesota represents a longstanding State goal as evidenced by its comprehensive discrimination statute, Minn. Stat. § 363.01, *et seq.* (1982). *United States Jaycees v. McClure*, 305 N.W.2d 764, 768 (Minn. 1981); 534 F.Supp. at 771. The Minnesota Supreme Court determined that the Jaycees constitute a place of public accommodation as defined in Minn. Stat. § 363.01(18) (1980). 305 N.W.2d at 774. As such, the District Court determined that the Jaycees could not discriminate on the basis of sex among its members. Further, application of the statute to the Jaycees would not impinge on its right of association. 534 F.Supp. at 772. The Court of Appeals' decision, however, makes the right of the Jaycees to treat women members differently from male members superior to the State's compelling interest in eliminating such sex discrimination.

In the past several decades, this nation has made great strides forward in eliminating all types of discrimination. Often in so doing, the Court has ruled that some constitutional rights, including the right of association, must defer to the greater right of equality under the law. *Runyon v. McCrary*, 427 U.S. 160 (1976); *Railway Mail Ass'n. v. Corsi*, 326 U.S. 88 (1945).

In its landmark case, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Court determined that segregated public schools could not be countenanced under the Fourteenth Amendment of the U.S. Constitution because they "generate a feeling of inferiority as to their [Black students'] status in the community that may affect their hearts and minds in a way unlikely to ever be undone." *Id.* at 494. The Jaycees' current membership practices do not

differ from other forms of segregation in form or substance. Relegation of women to an inferior status can have precisely the same effect. See MURRAY & EASTWOOD, *Jane Crow & the Law: Sex Discrimination & Title VII*, 34 *Geo. Wash. L. Rev.* 232 (1965).

The sections of Minnesota law at issue here, Minn. Stat. §§ 363.01(18) and 363.03(3) (1982), are designed to eliminate the invidious discrimination practiced by places of public accommodation such as the Jaycees. But, the lower court, after noting that the State's efforts to eliminate sex discrimination represented a public purpose of "the first magnitude", 709 F.2d at 1572, proceeded to decimate the State's effort to effect this purpose through its laws.² Failure of this Court to reverse the Court of Appeals' decision will give rise to the perverse result that a large and esteemed national organization, which solicits and markets membership without any threshold qualifications, may engage in sex discrimination among its members.

The Appellants, in their Jurisdictional Statement, have presented a full and accurate discussion of why the sections of the Minnesota statute challenged herein should apply to the U.S. Jaycees' conduct of its business in Minnesota and why

² In considering how to dispose of this action, the Court should carefully consider that a majority of the lower court judges were dissatisfied with their decision. Chief Judge Lay delivered a powerful dissenting opinion in which he eschewed the rationale underlying and the impact of the decision. Likewise, Judge Heaney in a separate opinion recommended that the court rehear the case *en banc* (which had been denied by an equally divided court) because of the court's failure to adopt the findings of the Minnesota Supreme Court that the U.S. Jaycees were a place of public accommodation under Minn. Stat. § 363.01(18) (1980). He, too, expressed concern that the effect of the court's decision would be "to deprive the latter [women] of an equal opportunity for leadership positions." 709 F.2d at 1583 (separate opinion).

the statute is not void for vagueness. NWB fully supports the arguments advanced by Appellants. NWB's purpose in submitting this brief is to stress that preservation of Minnesota's compelling interest in eliminating discrimination overrides any allegation that application of Minnesota's anti-discrimination statute to the Jaycees will infringe on the Jaycees' constitutional right of association.

ARGUMENT

THE STATE'S COMPELLING INTEREST IN SECURING FOR WOMEN THE SAME BENEFITS AFFORDED TO MEN BY A PLACE OF PUBLIC ACCOMMODATION OUTWEIGHS ANY ALLEGATIONS THAT THE STATE'S STATUTE, DESIGNED TO FURTHER THIS GOAL, IMPERMISSIBLY INFRINGES ON CONSTITUTIONAL RIGHTS OF THE JAYCEES.

The Minnesota Supreme Court unequivocally determined that the U.S. Jaycees constitute a place of public accommodation within the meaning of Minn. Stat. § 363.01(18) (1980). 305 N.W.2d at 765. As it must, the lower court adopted this finding. 709 F.2d at 1566, *citing, Winters v. New York*, 383 U.S. 507 (1948). However, the lower court incorrectly determined that the statutory label placed on the Jaycees would not permit its constitutional right of association to be impinged by the Minnesota statute and that the State has no compelling interest that would supercede the statute's intrusion on the Jaycees' constitutional right of association. In reaching its incorrect decision, the lower court misconstrued and misapplied legal precedent.

Freedom of association is, by judicial interpretation, inextricably bound to freedoms extended under the First Amendment. *NAACP v. Button*, 371 U.S. 415 (1963); *United Mine*

Workers v. Illinois State Bar Ass'n., 389 U.S. 217 (1967); *Buckley v. Valeo*, 424 U.S. 1 (1976). The threshold inquiry, therefore, must address what, if any, First Amendment freedoms will be abridged by applying the Minnesota law at issue to the Jaycees. The answer clearly is none.

One of the *major* activities of the Jaycees is the recruitment of new members. 534 F. Supp. at 769. This endeavor is actively encouraged by the Jaycees and 50 percent of its achievement awards are extended for the best recruiting results. *Id.* Further, the Jaycees' recruitment practices are almost totally void of selection criteria. In fact, in Minnesota, "there has never been a rejection of *any* application for membership." 305 N.W.2d at 771. (Emphasis added.) Clearly, no First Amendment freedom is at stake in this primary endeavor of the Jaycees.

Likewise, the lower court noted that the Jaycees engages in social and civic projects. 507 F.2d at 1569. However, there is no attempt to characterize, and rightly so, such activities as expressions of First Amendment rights. *Id.*

The Court of Appeals found the elusive First Amendment rights, in terms of which the Jaycees' freedom of association is couched, in its political and ideological activities. *Id.* However, the District Court properly identified such activities as only being taken "from time to time." 354 F. Supp. at 769. It can scarcely be argued that such random and clearly secondary activity by the Jaycees goes to its fundamental purpose. It is, therefore, clearly distinguishable from political parties and other special interest groups whose central focus is the assertion and dissemination of beliefs and ideologies, a right clearly protected by the First Amendment.³ *NAACP v. Button*, *supra*; *Buckley v. Valeo*, *supra*.

³ The lower court noted that the ideological activities are not an "insubstantial" part of what the Jaycees do. 709 F.2d at 1570. This conclusion is not supported by the record.

The lower court stated that no Supreme Court opinion had ever "limited the right of association to the context of political beliefs or expression." 709 F.2d at 1566. In fact, "[I]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. *Id.*, citing, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). To elevate a purely business organization to the same level as the NAACP or a political party is clearly inappropriate and, in doing so, to deny valuable rights to one class of individuals is unwarranted.

The lower court improperly protected the Jaycees' tenuous right of association on the mere chance that "some change in the Jaycees' philosophical cast can reasonably be expected [if women are afforded full membership status]." 709 F.2d at 1571. Mere speculation should not serve as the basis for elevating the Jaycees' amorphous right of association above the State's clear interest in promoting equality between the sexes. 709 F.2d at 1580, 1581 (dissenting opinion).

However, even assuming, *arguendo*, that the Jaycees does possess a freedom of association, that right is not absolute and may have to defer to a compelling state interest. *United Mine Workers v. Illinois State Bar Ass'n.*, *supra*. The facts herein represent just such an occasion.

Runyon v. McCrary, *supra*, provides compelling precedent to reverse the lower court. The Court of Appeals distinguished *Runyon* on the basis that the Jaycees is more like a private social club (which the Court declined to embrace in its decision; 427 U.S. at 167) than "a school that holds itself out as willing to sell its services to any member of the public." 709 F.2d at 1575. But the Jaycees is a place of public accommo-

dation, 305 N.W.2d at 774, and it publicly markets its memberships/training to the public. There really is no significant difference between the instant case and *Runyon*. Accordingly, *Runyon* should control and the alleged infringement of the Jaycees' freedom of association should defer to the greater need of the State to eliminate discrimination in places of public accommodation.⁴

Lastly, this Court must consider the nature of the right the State seeks to extend to women. It is the right to participate on an equal basis with men in an esteemed national and local organization, recognized for its management and leadership training. Membership in the Jaycees "gives them an edge in hiring for and promotion to leadership positions." 709 F.2d at 1583 (separate opinion). NWB places a premium on and supports active participation in the Jaycees by all of its employees and it is safe to assume that other corporations do not differ in this respect. Failure to reverse the Court of Appeals will clearly diminish the value of membership in the Jaycees to women in Minnesota, who, since 1974, have enjoyed and benefited from full participation in all the programs and other advantages extended by the Jaycees to its male members. It will have the perverse result of denying to women, on the basis of their sex alone, "an equal opportunity for leadership positions." *Id.*

⁴ The lower court escapes such compelling precedent by stating that "[O]ur decision is not controlled by precedent. We must look to principle and reason." 709 F.2d at 1576. The legal precedent is clearly on point and should control. The lower court's "principle and reason" merely leads it down the speculative and unsound path of reciting the potential and illusory effects of mandatory equality between male and female members of the Jaycees.

CONCLUSION

Northwestern Bell Telephone Company respectfully requests this Court to summarily reverse the decision of the lower court or to enter an order noting probable jurisdiction so that the substantial issues raised by this appeal can be fully examined.

Respectfully submitted,

JAMES A. GALLAGHER

General Attorney

Northwestern Bell

Telephone Company

200 South Fifth Street

Room 1800

Minneapolis, MN 55402

Telephone: (612) 344-5689

Attorney for Amicus Curiae

December 1, 1983

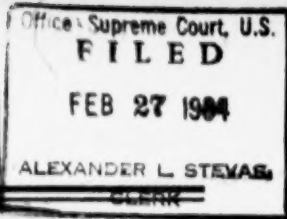
Of Counsel:

MARY FERGUSON LaFAVE

Attorney

Northwestern Bell Telephone

Company



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APPELLANTS' BRIEF

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
KENT G. HARBISON
Counsel of Record
Chief Deputy
Attorney General
102 State Capitol Building
St. Paul, MN 55155
Telephone: (612) 296-2351
Counsel for Appellants

Of Counsel:
THOMAS R. MUCK
Deputy Attorney General
RICHARD S. SLOWES
Assistant Attorney General
RICHARD L. VARCO, JR.
Special Assistant
Attorney General
State of Minnesota

QUESTIONS PRESENTED

1. Does the First Amendment to the United States Constitution allow a business that markets leadership training through the sale of memberships to discriminate against women in violation of a state human rights law merely because the organization also takes positions on some public issues when the sex of the members has no demonstrated effect on the content of those positions?

2. In rejecting the United States Jaycees' suggestion that it is a private membership organization, did the Minnesota Supreme Court create a distinction between public accommodations and private membership organizations which is vague and hence unconstitutional?

PARTIES TO THE PROCEEDING

The caption of this case contains the name of one of the parties, George A. Beck, to the proceeding before the United States Court of Appeals for the Eighth Circuit whose judgment in the above stated questions appellants seek to have reviewed. Kathryn R. Roberts and Hubert H. Humphrey, III have now replaced Marilyn E. McClure and Warren Spannaus, respectively, as Acting Commissioner of the Minnesota Department of Human Rights and Attorney General.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceeding	ii
Opinions Below	1
Jurisdiction	2
Constitutional Provision, Statutes	3
Statement Of The Case	4
A. Procedural History	4
B. Background: Nature of the United States Jaycees	6
1. The Public Nature of the Jaycees	6
2. The Nature of Jaycees' Programs and Activities	9
3. The Nature Of The Jaycees' Treatment Of Female Members	11
Summary Of The Argument	13
Argument	15
I. Application Of The Minnesota Human Rights Act Is Not A Burden On The Jaycees' First Amendment Right To Speak, Assemble, Or Peti- tion For Redress Of Grievances	15
A. Freedom of Association Protects First Amendment Rights But Is Not An Inde- pendent First Amendment Right	15

	Page
B. The Record Does Not Support The Conclusion That Equal Membership Rights For Women Will Abridge Any Enumerated First Amendment Right Of The Jaycees . .	20
II. The State's Interest In Prohibiting Sex Discrimination In Public Accommodations Is Compelling And Thus Justifies An Abridgement Of A First Amendment Freedom	23
III. The Minnesota Supreme Court's Opinion In McClure v. United States Jaycees Does Not Create An Unconstitutionally Vague Distinction Between Public Accommodations And Private Membership Organizations	28
Conclusion	33

	Page
Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967)	29
Buckley v. Valeo, 424 U.S. 1 (1976)	19, 23
Cousins v. Wigoda, 419 U.S. 477 (1975)	21
Fesel v. Masonic Home of Delaware, Inc., 428 F. Supp. 573 (D. Del. 1977)	30
Garcia v. Texas State Board of Medical Examiners, 421 U.S. 995 (1975), <i>aff'g mem.</i> 384 F. Supp. 434 (W.D. Tex. 1974)	19, 20
Griswold v. Connecticut, 381 U.S. 479 (1965)	19
Healy v. James, 408 U.S. 169 (1972)	19
Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)	23
NAACP v. Alabama <i>ex rel.</i> Patterson, 357 U.S. 449 (1958)	17, 19
NAACP v. Button, 371 U.S. 415 (1963)	19
Norwood v. Harrison, 418 U.S. 455 (1973)	16
Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973)	19
Parker v. Levy, 417 U.S. 733 (1974)	32
Quijano v. University Federal Credit Union, 617 F.2d 129 (5th Cir. 1980)	30
Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945)	16

TABLE OF AUTHORITIES

	Page
<i>United States Constitution:</i>	
First Amendment	<i>passim</i>
<i>Federal Statutes:</i>	
28 U.S.C. § 1254(2)	2
28 U.S.C. § 1343	2
42 U.S.C. § 1981	30
42 U.S.C. § 1983	2, 5
42 U.S.C. § 2000a(e)	30
42 U.S.C. § 2000e(b)(2)	30
<i>Minnesota Statutes:</i>	
Minn. Laws 1973, Resolution No. 1	24
Minn. Stat. § 3.9222 (1982)	24
Minn. Stat. § 363.01, subd. 18 (1982)	2, 3, 4, 5
Minn. Stat. § 363.03, subd. 3 (1982)	3, 4
Minn. Stat. § 363.101 (1982)	29
Minn. Stat. § 363.12 (1982)	24
Minnesota Human Rights Act, Minn. Stat., ch. 363 (1982)	<i>passim</i>
<i>Federal Cases:</i>	
A. B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925)	29
Baker v. Nelson, 409 U.S. 810 (1972), <i>dismissing appeal from</i> 291 Minn. 310, 191 N.W.2d 185 (1971)	20
Bates v. City of Little Rock, 361 U.S. 516 (1960)	23
Bob Jones University v. United States, 103 S. Ct. 2017 (1983)	26

	Page
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	19
Runyon v. McCrary, 427 U.S. 160 (1976)	16, 20, 22
Shelton v. Tucker, 364 U.S. 479 (1960)	18, 19
United States Jaycees v. McClure, 534 F. Supp. 766 (D. Minn. 1982), <i>rev'd</i> , 709 F.2d 1560 (8th Cir. 1983), <i>prob. juris. noted</i> 51 U.S.L.W. 3497 (U.S. Jan. 9, 1984) (No. 82-724)	27, 28
United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967)	19
United States v. Trustees of Fraternal Order of Eagles, 472 F. Supp. 1174 (E.D. Wisc. 1979)	30
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	19
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)	32
Vorchheimer v. School District of Philadelphia, 430 U.S. 703 (1977), <i>aff'g by equally divided court</i> 532 F.2d 880 (3rd Cir. 1975)	26
Wright v. Salisbury Club, 632 F.2d 309 (4th Cir. 1980)	30
 <i>State Cases:</i>	
Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971)	23
State v. Moseng, 245 Minn. 263, 95 N.W.2d 6 (1959)	29
 <i>Books:</i>	
1 Encyclopedia of Private Associations (15th ed. 1980), Gale Research Co.	27
C. Jencks, <i>Inequality—Reassessment Of The Effect Of Family And Schooling In America</i> (1972)	25

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-724

KATHRYN R. ROBERTS, Acting Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY, III, Attorney
General of the State of Minnesota;
and GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of
itself and its qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPELLANTS' BRIEF

OPINIONS BELOW

The opinion of the United States District Court for the District of Minnesota is reported at 534 F. Supp. 766 (D. Minn. 1982); that of the United States Court of Appeals for the Eighth Circuit at 709 F.2d 1560 (8th Cir. 1983). The opinion of the Minnesota Supreme Court is reported at 305 N.W.2d 764 (Minn. 1981). The decision of Administrative Hearing Examiner George A. Beck is unreported and is reproduced in the Appendix to Appellants' Jurisdictional Statement at 98 through 130.¹

¹ Citations to this document will be to Appendix (herein "App.") and the appropriate page.

JURISDICTION

This appeal is taken from a judgment entered June 7, 1983, by the United States Court of Appeals for the Eighth Circuit. A timely petition for rehearing of the panel's 2 - 1 decision was denied by an evenly divided (4 - 4) court in an order entered August 1, 1983. The court reversed the judgment of the district court and ordered it to enter injunctive relief with respect to appellants (defendants—below) on the basis that they were acting pursuant to a state statute which unconstitutionally infringed plaintiff's first amendment associational rights and was unconstitutionally vague as interpreted. The action in the lower court was brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. This federal court action was commenced by the United States Jaycees after it was enjoined from sex discrimination in the sale of its membership by Hearing Examiner George Beck in an administrative contested case brought pursuant to the Minnesota Human Rights Act, Minn. Stat. ch. 363 (1982). Prior to issuing its decision in this matter, the district court certified to the Minnesota Supreme Court the question whether as a matter of state law the United States Jaycees is a place of public accommodation within the meaning of Minn. Stat. § 363.01, subd. 18 (1982). That question was answered in the affirmative. A notice of appeal to this Court was filed in the United States Court of Appeals for the Eighth Circuit on October 11, 1983. The appeal was docketed with this Court on October 31, 1983, within 90 days from the entry of the lower court's order denying the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISION, STATUTES

This appeal involves the following federal and state laws: First Amendment, United States Constitution, as it relates to freedom of speech and association:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

Minn. Stat. § 363.03, subd. 3 (1982):

It is an unfair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.

Minn. Stat. § 363.01, subd. 18 (1982):

'Place of public accommodation' means a business accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public.

STATEMENT OF THE CASE

A. Procedural History.

In 1974 and 1975 respectively, the Minneapolis and St. Paul chapters of the United States Jaycees began to sell memberships to women which placed them on equal footing with male members. Females in those chapters could therefore vote, hold office, and were eligible for awards. By treating women in this manner, these local chapters were acting contrary to the Jaycees' by-laws which reserved these membership privileges to males. After being notified by the Jaycees that their charters were in danger as a result of their treatment of female members, members of the Minneapolis and St. Paul chapters filed charges of discrimination in 1978 with the Minnesota Department of Human Rights alleging that the proposed charter revocations constituted a violation of the public accommodations provision of the Minnesota Human Rights Act. Minn. Stat. § 363.03, subd. 3 (1982). Thereafter, on January 25, 1979, the Commissioner of the Department of Human Rights found probable cause to believe that the Jaycees was engaging in illegal sex discrimination, issued a complaint, and set the matter on for a hearing before a state hearing examiner, George Beck. App. at 94.

On February 27, 1979, the Jaycees filed suit in the United States District Court for the District of Minnesota seeking to enjoin enforcement against it of the Human Rights Act. The Jaycees claimed that the proceedings before Examiner Beck deprived it of the freedom to associate or not associate guaranteed by the first and fourteenth amendments to the United States Constitution. Moreover, the organization claimed that the definition of a place of public accommodation, Minn. Stat. § 363.01, subd. 18 (1982), was unconstitutionally vague. That action was dismissed without prejudice. App. at 95-96.

The hearing before Examiner Beck followed. The administrative proceedings concluded with the issuance on October 9, 1979, of Beck's decision. He held that the Jaycees was a public accommodation within the meaning of the Human Rights Act and that its sexually discriminatory membership practices violated the statute. He therefore enjoined the Jaycees from revoking the charter of any local chapter in Minnesota and from discriminating against any member or applicant for membership within the state on the basis of sex. App. at 107-109.

On October 31, 1979, the Jaycees again initiated a federal court proceeding pursuant to 42 U.S.C. § 1983. Underlying that action was an unanswered question of state statutory law. Therefore, pursuant to a request from the district court, the Minnesota Supreme Court answered in the affirmative the certified question as to whether the United States Jaycees was a "place of public accommodation" within the meaning of Minn. Stat. § 363.01, subd. 18 (1982). App. at 69 *et seq.* The record which the supreme court had before it consisted of the transcript and exhibits of the administrative hearing before Beck. Joint Appendix at 35.

At the trial which followed in the district court, the Jaycees joined its claim of associational freedom with the additional assertion that the public accommodation provision of the Human Rights Act was vague as construed. The district court rejected the Jaycees' vagueness arguments. App. at 65-66. In addition, the trial court held that the state's interest in securing freedom for its citizens from sex discrimination outweighed whatever associational interest, the existence and extent of which it left undecided, was accorded the Jaycees by the first amendment. *Id.* at 60-64.

This decision was reversed by a divided court of appeals panel. It held (2-1) that when the Jaycees takes positions on

political and civic issues, it is engaging in a traditional first amendment activity. App. at 19-23. Reasoning that the state's interest in eliminating sex discrimination is not sufficiently compelling to override the Jaycees' associational interest in determining the composition of its membership, the court held that the Jaycees is entitled to the freedom to associate in a sexually discriminatory manner. The court reached this conclusion in the absence of any evidence that sex is a factor in any Jaycees' position on a political or civic question.

On August 1, 1983, an evenly divided court (4-4) denied the state's timely filed petition for rehearing. An appeal to this Court was filed on October 11, 1983 and docketed in this Court on October 31, 1983. In an order dated January 9, 1984, this Court noted probable jurisdiction. 51 U.S.L.W. 3497 (U.S. Jan. 9, 1984) (No. 83-724).

B. Background: Nature of the United States Jaycees.

1. The Public Nature of the Jaycees.

The United States Jaycees is a nationwide civic organization which styles itself as a "leadership training organization." HRT 2 at 8, 9; P. Exhs. 1 and 2 (back covers) (T. 10, 13).² It consists for the most part of approximately 295,000

² The record before this Court has two sources. First, the transcript and exhibits from the United States District Court are referred to as "T." and "P. Exh." together with the appropriate page or number. Parenthetical citations following these exhibits are included in compliance with Rule 34.5 of this Court. Second, and more extensive, is the transcript and exhibits in the proceeding before Administrative Hearing Examiner George Beck. The two volume transcript of that proceeding is referred to as "HRT 1" or "HRT 2". The exhibits are "Complainant (Comp.)" or "Respondent (Res.) Exh." These exhibits and this transcript were introduced at and received by the district court. T. at 3-6.

Individual Members spread throughout 7,500 local (usually city) chapters in each of the 50 states and the District of Columbia.³ P. Exh. 21 (T. 45); T. at 12. Its by-laws state that the organization's purpose is to provide its members:

with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.

P. Exh. 1 (T. 10) at 1. What has evolved from this purpose is an organization which, in exchange for a fee, provides its members with written materials and opportunities for development of leadership, communication, and management skills. Comp. Exhs. 6 at 3-5 and 80 at 1.⁴ It also provides awards and recognition for achievement in those skills. Comp. Exh. 76. Jaycees membership is aggressively marketed to the public and is sold to interested persons on an unselective basis. App. at 104-5, 119.

³ The Jaycees' by-laws create seven classes of membership. These include Individual Members, Associate Individual Members, Local Organization Members (local chapters), and State Organization Members (state chapters). P. Exh. 1 (T. 10) at 3-6.

⁴ This training:

is based on the concept of 'Developing the Whole Man' by utilizing three essential functions: Individual Development, Management Development, and Community Development Programming. These three inter-related and mutually complimentary functions form a triangle to represent the Jaycees' goal which is to enhance the potential of each individual Jaycee member as well as benefit the community in which he lives.

P. Exh. 1 (T. 10), back cover. The organization has developed and made available to its members numerous programs which provide opportunities to develop organization, communication, and leadership skills. P. Exh. 20 (T. 42) at 6-7; Comp. Exhs. 2, 6 at 5, and 52 at 3-4.

That memberships are sold on an unselective basis is evident from the lack of criteria for selecting members. Save for age and sex, the Jaycees has published nothing with respect to criteria for Individual Membership. Instead it encourages as large and as diverse a membership as possible. HRT 1 at 112, 135-136. The lack of membership criteria is evident in the operation of the Minneapolis and St. Paul chapters. In considering membership applications, neither chapter uses a selection committee, employs a background check, or sets any standard for admission other than age.⁵ HRT 1 at 124-32, 174-76.

Public offering of membership is evident in the marketing techniques used by the Jaycees—those of a business selling goods and services. Continuous public solicitation of new members is one of the hallmarks of the Jaycees. Thus, Jaycees' literature touts the need for membership growth, employing terms more commonly used in sales promotion campaigns. Publications which are made available on a nationwide basis stress the need for utilizing techniques by which membership in the Jaycees can be increased. Thus, the Officers and Directors Guide offers "hints on 'how to sell Jaycees' which you can review and use to recruit Jaycees", Comp. Exh. 6 at 21-25; the Regional Directors Handbook advises those individuals not to "set membership goals for chapters. Let them set their own (as long as they plan an increase in membership)", Comp. Exh. 44 at 14 (emphasis in original); and the United States Jaycees Recruitment Manual speaks of "Jaycees, the product you are selling." Comp. Exh. 24 at 5. The importance of convincing members of the public to purchase a Jaycees membership is also evident from the large number of individ-

⁵ Jaycees' by-laws limit Individual Membership to males aged 18-35. P. Exh. 1 (T. 10) at 3-4.

ual and group achievement awards presented by the Jaycees which are conditioned, in part, upon recruiting activities. Comp. Exh. 76 at 6-7. Thus, for example, the organization prizes record-breaking achievements regarding increased membership sales, *e.g.*, most in the year by one person (348), most in a month (134), most in a lifetime (1,586). Comp. Exh. 70 at 2. *Accord* Comp. Exhs. 45, 66.

2. The Nature of Jaycees' Programs and Activities.

In exchange for a membership fee, Jaycees are allowed to enhance their management and leadership skills and to acquire recognitional credentials through a number of programs, materials, and awards. One such program which the Jaycees developed involves the raising of funds for the Muscular Dystrophy Association. P. Exh. 13 (T. 32).⁶ A Jaycee who managed that program could benefit by enhancing or developing management skills while at the same time contributing to the improvement of his community and elevating the status of his Jaycees chapter. As aids to the successful completion of this project, the Jaycee would have at his disposal a variety of organizational techniques developed by the Jaycees, the support of other Jaycees, and the name recognition which has resulted from Jaycee community involvement. App. at 102-103, 106.

The Jaycees provides to its members a variety of materials regarding the organization and management of people and time. Comp. Exhs. 22, 23, and 38. One example of this type of program is the Jaycees' "Speak Up" program which is designed to train individuals in the art of public speaking.

⁶ Other examples of these programs are the Junior Athletic Championship, Cardiopulmonary Resuscitation, and Shooting Education programs. P. Exhs. 16 (T. 34-35), 14 (T. 33), and 17 (T. 35).

Comp. Exh. 53. Finally, the Jaycees furnishes to its members extensive materials regarding chapter and state organization management. *E.g.*, Leadership Dynamics (Comp. Exh. 41), Officers' and Directors' Guide (Comp. Exhs. 6, 52), and Chapter President's Management Handbook (Comp. Exh. 2).

Participation by Jaycees in community affairs has not been limited to apolitical or non-ideological activities. P. Exhs. 14, 16 (T. 33, 34, 35). Thus in 1979, for example, the Jaycees provided a program to its local chapters which explained how members could organize "get out the vote" drives. P. Exh. 20 (T. 42) at 8. In 1981 the Jaycees made available a program to its local chapters which provided the organizational framework pursuant to which interested Jaycees could lobby for passage of the then-current economic program of the Reagan administration. P. Exh. 6 (T. 24). *See also* P. Exh. 7 (T. 25) (Program pursuant to which Washington Jaycees could organize to support a constitutional amendment requiring Congress to balance the annual budget).

In addition to providing programs by which its chapters and members can participate in the political process, the organization itself makes statements regarding issues of concern to the membership.⁷ These policy statements are adopted, except for unusual or compelling reasons, by the Jaycees' Executive Board of Directors (its national officers and presidents of its state chapters). P. Exh. 1 (T. 10) at 56-58. Thus, for example, in 1980, the Jaycees urged Congress to act to

⁷ The activities of the Jaycees at national, state, and local levels are reported in the organization's magazine, "Future", a copy of which is sent to each Jaycee. Comp. Exh. 26, T. at 45. This magazine contains articles and editorial positions on issues of interest to the Jaycees. P. Exhs. 4 and 22 (T. 18, 21, 46). Nevertheless, Jaycees' by-laws provide that the opinions in this magazine do not necessarily represent the official attitude or policy of the organization. P. Exh. 1 (T. 10) at 3.

achieve the voluntary use of prayer in schools and to legislate in a manner that would ensure "that the natural resources of Alaska can be developed in a rational manner for the good of the nation." P. Exh. 1 (T. 10) at ii.⁸

Jaycees chapters have engaged in similar activity at the state and city level.⁹ In 1971, for example, Minnesota Jaycees supported efforts to reduce the size of the Minnesota Legislature. Maryland Jaycees sought legislation which would permit voting rights for ex-offenders. In 1962 Jaycees from Watertown, Massachusetts were involved in efforts to obtain passage of a city charter.

The Jaycees also provides to its members awards and recognition for achievement. The attractiveness of membership in the Jaycees is not therefore limited to opportunities for individual development and community contribution. In conjunction with its programs, the Jaycees has developed and utilizes an extensive awards program. This program recognizes, at the local, state, and national level, the contributions and achievements of individual Jaycees and Jaycees chapters. P. Exh. 1 (T. 10) at 33-34; Comp. Exhs. 6 at 72-74 and 76. These awards thus serve as an added incentive for individual Jaycees to make the most of membership in that organization. Comp. Exh. 6 at 20.

3. The Nature Of The Jaycees' Treatment Of Female Members.

The extensive marketing of membership in which the Jaycees engages occurs against a backdrop of sex discrimination. Women cannot purchase a membership which entitles

⁸ A list of the policy statements, i.e., external policies, adopted by the Jaycees from 1956 through 1981 is found in P. Exh. 3 (T. 15).

⁹ A list of state and local Jaycees projects regarding public issues is contained in P. Exh. 19 (T. 38-39).

them to the same benefits that men receive. Women can join that organization and can participate in programs of individual, community, and chapter development. They cannot, however, be Individual Members, but instead are relegated to the category of Associate Individual Members. P. Exh. 1 (T. 10) at 3-4. In that position women are denied the privilege of voting and the opportunity of seeking and holding elective office at the local, state, or national level. T. at 57-60; HRT 1 at 107. Although they can render meritorious service through participation in Jaycees activities and programs, female Jaycees are excluded from formal recognition of such conduct by their peers. They are barred not only from elective leadership positions, but also from participation in virtually all of the Jaycees awards programs. Comp. Exh. 76; HRT 1 at 28, 159-161. See T. at 60.

Although it is prohibited by the Jaycees' by-laws, local chapters in Minnesota have admitted women as Individual Members. Since 1974 and 1975 respectively, the Minneapolis and St. Paul chapters have admitted and treated women on an equal basis. HRT 1 at 120, 157, 168. Female membership in the Minneapolis chapter grew from 45 in 1975 to approximately 180 members in 1979. *Id.* at 123. In 1981, there were 312 female Individual Members in Minnesota. P. Exh. 21 (T. 45). As might be expected, women have run for and been elected to various offices in those chapters. HRT 1 at 124, 169. As a result of the admission of women on equal footing with men, the Jaycees initiated proceedings in 1978 to revoke charters of the Minneapolis and St. Paul chapters. Comp. Exhs. 77-78; HRT 1 at 123, 168.

SUMMARY OF THE ARGUMENT

The State of Minnesota has demonstrated to its supreme court that the United States Jaycees is a public accommodation as that term is defined in the Minnesota Human Rights Act. It therefore obtained an injunction against the organization's sexually discriminatory treatment of its female members. The decision of the court of appeals which, in effect, dissolved that injunction contains three errors.

First, application of the Minnesota Human Rights Act to the Jaycees is not prohibited by the first amendment to the United States Constitution. The Jaycees' claim and the court of appeals' decision to the contrary, there is no independent freedom to associate found in that amendment. Freedom of association is a derivative protection for the collective exercise by individuals of the enumerated freedoms of press, speech, petition or assembly. If female members of the Jaycees are permitted to vote, hold office, and to be eligible for awards in that organization, this will not result in any impediment to the exercise by male Jaycees through that organization of any enumerated first amendment right. The first amendment is not, therefore, a barrier to Minnesota's restrictions on the membership practices of the Jaycees.

Second, even if the application of the Minnesota Human Rights Act to the Jaycees did abridge a first amendment freedom, the interest of the state is so compelling as to override it. The State of Minnesota has an important public policy which it has statutorily articulated in the Minnesota Human Rights Act of securing for its female citizens freedom from discrimination in employment, housing, public services, education, and public accommodations. That interest is more significant than and overrides whatever associational interest the Jaycees has

in imposing sex-based restrictions in the sale of its memberships. In reaching a contrary conclusion, the lower court refused to accord full weight to the Minnesota Supreme Court's finding that the Jaycees is a place of public accommodation and therefore suggested that the state's interest can be met without enjoining the Jaycees from discriminating against its female members. Moreover by suggesting that the state has not demonstrated that the Jaycees is the only route to success for a professional person, the court improperly narrowed the scope of the state's interest in securing equal access for women to all commercial activities which serve the public. Finally, in suggesting that the state has less restrictive methods of regulating the Jaycees' illegal discriminatory conduct, the lower court has offered only less effective means.

Third, the Minnesota Supreme Court has not established an unconstitutionally vague distinction between businesses which are open to the public and private associations. The court did not leave the Jaycees without a comprehensive standard to guide its conduct. It discussed in detail the application of the law to the facts concerning the Jaycees. The court also referred to analogous case law establishing the differences between public and private associations. The standard established by the court is clear and definite. Moreover, the Human Rights Act applies to the Minnesota Jaycees as it presently operates. The lower court's conclusion that the state supreme court established an unconstitutionally vague standard does not permit it to relieve the Jaycees of responsibility for complying with the Human Rights Act. To have done so was erroneous because the Jaycees has no standing to challenge as vague a statute which unquestionably applies to it.

ARGUMENT

I. APPLICATION OF THE MINNESOTA HUMAN RIGHTS ACT IS NOT A BURDEN ON THE JAYCEES' FIRST AMENDMENT RIGHT TO SPEAK, ASSEMBLE, OR PETITION FOR REDRESS OF GRIEVANCES.

The question presented is whether application of the Minnesota Human Rights Act to the Jaycees places an unconstitutional burden on the first amendment rights of that group. Throughout this litigation the Jaycees has claimed that a first amendment associational freedom permits it to determine "the composition of its membership and its ownership on such terms as they see fit." J. App. at 8. *Accord* T. at 50-51 ("[W]ho our members are and what we do is a matter of freedom of association and it cannot be interfered with by the state"). An examination of the first amendment and of this Court's decisions reveals that this claim has no basis in the Constitution; is wrong on the facts; and rests upon a theory of law rejected by this Court.

A. Freedom Of Association Protects First Amendment Rights But Is Not An Independent First Amendment Right.

Freedom of association is not an enumerated first amendment freedom. Instead, it is a derivative right whose existence the Court has sometimes deemed necessary in order to protect the collective exercise by individuals of enumerated first amendment rights such as free speech or assembly.

Rejection of the idea that freedom of association is an independent constitutional right is most evident in opinions of this Court regarding racial discrimination. In these cases

organizations sought to do precisely what the Jaycees seeks to do in this matter. The practice of racial segregation, it was argued, was sheltered as a form of constitutionally protected association. This socially destructive view of the first amendment was dismissed by the Court in *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). The Court commented that:

Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

The Court's remarks in *Norwood* were presaged by its decision in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945). In that case, New York prohibited labor unions from denying membership to any individual on the basis of race, color, or creed. A union, which limited its membership to male caucasians or American Indians, argued that this law violated the fourteenth amendment "as an interference with its right of selection to membership and abridgement of its property rights and liberty of contract." *Id.* at 93. In affirming New York's regulatory authority, the Court indicated that it saw:

no constitutional basis for contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees.

Id. at 94 (citations omitted).

Similarly, the Court failed to perceive that associational freedom would justify discrimination in *Runyon v. McCrary*, 427 U.S. 160 (1976). In *McCrary* white parents argued that the racially discriminatory admission practices of private

educational institutions were shielded by a claimed first amendment freedom of association. *Id.* at 175-176. This Court rejected the broad argument of the parents. It observed that while a freedom of association has been recognized it has been recognized to preserve free speech, i.e., the "effective advocacy of both public and private points of view, particularly controversial ones, that the First Amendment is designed to foster." *Id.* at 175. The Court did recognize that the first amendment protected the rights of parents to hold segregationist views and to establish schools for the purpose of promoting these beliefs. *Id.* It did not follow, the Court held, "that the practice of excluding racial minorities from such institutions is also protected by the same principle." *Id.* at 176 (emphasis in original).

When this Court has referred to a freedom of association, it has done so in response to an infringement upon a first amendment guarantee of free speech, press, petition, or assembly. Freedom of association emerged as a derivative right in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). In that case Alabama sought to compel the state chapter of the NAACP to reveal the names and addresses of its Alabama agents and members. *Id.* at 451. This disclosure was requested in an atmosphere of racial animosity which had in the past "exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 461. Prior to determining whether the Constitution protected the organization from this disclosure, the Court noted that "effective advocacy . . . is undeniably enhanced by group association" and that there is a "close nexus between the freedom of speech and assembly." *Id.* at 460. The Court was, appellants submit, merely holding that disclosure of the information sought by the state would chill or

impede the NAACP's exercise of free speech and assembly and that a "freedom of association" best described that which it sought to protect—the collective exercise by NAACP members of those rights.

Similarly, in *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court reviewed an Arkansas statute requiring every teacher in a state-supported school or college to choose between termination and annually filing an affidavit setting out each organization to which that individual had belonged or regularly contributed to within the past five years. *Id.* at 480-81. This statute, it was claimed, deprived Arkansas teachers of their "rights to personal, associational, and academic liberty." *Id.* at 485. The Court invalidated the law. The basis of this Court's decision in *Shelton* was its recognition that because the disclosing teacher served at the will of individuals to whom the disclosures were made, public pressure upon teachers who were viewed as belonging to "unpopular or minority organizations could easily be brought to bear." *Id.* at 486-87 and n. 7. It is this potential chilling of free speech, speech made in an associational form, which was the basis of this Court's opinion. *Id.*

The mistaken notion which the Jaycees has regarding the scope of associational freedom is best contained in the observation by the court of appeals that:

There are rights protected by the federal Constitution not specifically spelled out in so many words in that document. Among these rights is the right or freedom of association, and this right has not been rigidly limited to groups whose activities fall clearly within the specific guarantees of the First Amendment.

App. at 18. This statement cannot be supported by the decisions of this Court upon which the appellate court relied.¹⁰ In each of those cases, the challenged action was an infringement upon a first amendment guarantee of free speech, press, petition, or assembly. None of the cases holds that there is a freedom of association independent of an enumerated first amendment freedom. Absent a threat to such freedom, there is no constitutional freedom of association.

The unprecedented view which the Jaycees takes of associational freedom as protecting not an enumerated first amendment right but solely a form of association has been properly rejected by this Court in non-racial contexts. Thus in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7, 9 (1974), the Court dismissed the assertion by a group of six unmarried men and women that a zoning regulation which prohibited their living together in a residential neighborhood violated their constitutionally protected freedom of association. See *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 65 (1973). This Court has summarily disposed of similar past attempts to improperly use freedom of association. *Garcia v. Texas State Board of Medical*

¹⁰ These cases are *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577-79 (1980); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Healy v. James*, 408 U.S. 169, 181 (1972); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). App. at 13-16. *Buckley, Healy, Shelton*, and *NAACP v. Alabama* protect the freedom to associate necessary to espouse beliefs and ideas. *United Mine Workers* and *Button* protect the association necessary to seek legal redress. *Richmond Newspapers*, citing *NAACP v. Alabama*, notes in dicta that freedom of association is protected together with explicit constitutional guarantees. 448 U.S. at 579-80. *Griswold* finds no independent constitutional basis for freedom of association but grounds it upon a need to protect express first amendment guarantees. 381 U.S. at 483.

Examiners, 421 U.S. 995 (1975), *aff'g mem.* 384 F. Supp. 434, 440 (W.D. Tex. 1974) (Corporation without any licensed doctors on its board of directors sought to provide low cost health care to low-income citizens. Court held that there was no first amendment freedom to associate for purpose of practicing medicine without a license); *Baker v. Nelson*, 409 U.S. 810 (1972), *dismissing appeal from* 291 Minn. 310, 191 N.W.2d 185 (1971) (Minnesota Supreme Court rejected a claim that the ban on same-sex marriage violated first amendment).

Freedom of association has no independent existence. It derives from a need to protect enumerated first amendment rights in a particular case. Absent a threat to an enumerated right, it has no application in this case.

B. The Record Does Not Support The Conclusion That Equal Membership Rights For Women Will Abridge Any Enumerated First Amendment Right Of The Jaycees.

In *Runyon v. McCrary*, 427 U.S. at 176, this Court questioned whether prohibiting racial discrimination by a private school would impede the exercise of any first amendment rights of the pupils' parents. The Court observed:

[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle (emphasis in original).

The Court concluded that the record did not show that advocacy by the parents of their beliefs in the form of teaching of any particular idea or dogma would be inhibited by prohibiting the practice of discrimination. *Id.* Likewise, in the instant case the record does not show that the advocacy by Jaycees of any of its beliefs, or indeed its exercise of any other first amendment freedom, would be impaired by giving women full membership rights.

To the contrary, the record shows that "the specific content of most of the resolutions adopted over the years by the Jaycees has nothing to do with sex." App. at 24. Consistent with that fact, there is nothing in the record which would indicate that prospective Jaycees are screened on the basis of ideology or that the Jaycees has taken a position on any issue in which gender would of necessity dictate the outcome. *See* T. at 72-73;¹¹ HRT 1 at 135-36.

Although equal membership privileges for women would not result in gender specific infringement upon an enumerated first amendment right, it has been suggested that the Jaycees' associational freedom was impinged to the extent that this equality would change the organization's purpose. "It will become an association for the advancement of young people." App. at 24. This conclusion is but a tautology which is at odds with reality. Even in their present second-class status, women can and do make significant contributions to the fundamental aims of the Jaycees. Womens' activities are thus completely consistent with the by-law stated purposes of the Jaycees. Women can partake of and direct the numerous civic, personal development, and leadership programs which local Jaycees chapters

¹¹ Thus, the Jaycees differs from a political party whose control of organizational procedures and hence membership is based upon a desire to limit the content of the organization's speech. *See Cousins v. Wigoda*, 419 U.S. 477 (1975).

offer. T. at 57-60; HRT 1 at 150-156. Women thereby "promote and foster the growth and development of" the Jaycees. P. Exh. 1 (T. 10) at 1. Equality of membership among the sexes would not deprive male Jaycees of the by-law mandated "opportunity for personal development and achievement . . . [or deny them] an avenue for intelligent participation . . . in the affairs of their community, state, [or] nation." *Id.* Simply put, the Jaycees can point to no organization goal to which women cannot and do not aspire, no organization function which women cannot perform, and no organization position regarding which sex mandates a point of view. See T. at 73-75. Allowing women to vote, hold office, and receive awards will therefore change nothing about the organization except its sexually restrictive nature.

The Jaycees' claim that freedom of association protects its denial of equal access to women should be rejected on the same basis that this Court rejected the claim of the parents in *McCrary* that associational freedom insulated their racially motivated practice of denying educational opportunities to black children. To do otherwise, to adopt the holding of the lower court is to grant constitutional license to the segregationist practices of any public accommodation which takes positions on behalf of its customers or members regarding political or civic issues. Just as integration of the *McCrary* schools would not interfere with the racial philosophy or teachings at those institutions, so too will the integration of the Jaycees have no effect on participation by members of that group in civic affairs and community service or on the positions articulated by that organization on public issues. This Court should, therefore, reject as constitutionally groundless the idea that the first amendment protects not only the right to espouse sex discrimination, but in the context of the Jaycees, the right to practice it.

II. THE STATE'S INTEREST IN PROHIBITING SEX DISCRIMINATION IN PUBLIC ACCOMMODATIONS IS COMPELLING AND THUS JUSTIFIES AN ABRIDGEMENT OF A FIRST AMENDMENT FREEDOM.

Even if this Court were to conclude that some first amendment freedom has been abridged, the Minnesota Human Rights Act may still be applied to the Jaycees. This Court has held that even a "significant encroachment" by the government into a first amendment freedom is permissible if the regulation is in furtherance of a state interest which is "compelling". *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). *Accord Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Any encroachment in the instant case is hardly significant. As argued above granting women full membership privileges will not prevent the Jaycees from carrying on the programs and activities which it has for years. In any event, an interest of compelling magnitude underlies the state's prohibition against sex discrimination in public accommodations.

Equality of access to the market place for women is a significant state interest. No one can seriously dispute that "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments"¹² is not felt as deeply by women so treated as by persons accorded it on the basis of color. *See also Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 19, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340-41 (1971) and cases cited therein. The Minnesota legislature has recognized this, indicating that it is "the public policy" of the state to obtain for its citizens "freedom from discrimination . . . [i]n public accommodations because of race . . . [and] sex" and declaring

¹² *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964).

The Court noted that the primary purpose of the public accommodations provision of the Civil Rights Act of 1964 was to eliminate this deprivation for persons of color.

that the opportunity to obtain such access is a civil right. Minn. Stat. § 363.12 (1982). Further evidence of the desire of the Minnesota legislature to provide equality of opportunity for women in Minnesota is its ratification of the proposed amendment to the Constitution of the United States relating to equal rights for men and women under the law. Minn. Laws 1973, Resolution No. 1 at 2465. Finally, this interest in equal economic opportunities for women is evident in the responsibilities and duties assigned by the legislature to the Advisory Council on the Economic Status of Women. Minn. Stat. § 3.9222 (1982). The council is responsible for studying all matters relating to the economic status of women in Minnesota and recommending to the legislature "action designed to enable women to achieve participation in the economy." *Id.*

Given the foregoing, it is understandable that the lower court concluded that the state's interest in clearing "the channels of commerce of the irrelevancy of sex, to make sure that goods and services and advancement in the business world are available to all on an equal basis" is a public purpose of the "first magnitude." App. at 27. What is not understandable, however, and what constitutes error on the part of the lower court is its conclusion that an interest of this significance did not override the associational freedom to which the Jaycees was deemed to be entitled.

Numerous errors permeate that conclusion. First, after concluding that the state's interference with the Jaycees' right of association would be "direct and substantial,"¹³ it noted that

¹³ App. at 26. As was noted above, this conclusion was reached without any evidence that Jaycees' positions on political and social issues would be affected by a change in the sex of its members. The degree of interference found has been accurately described only if the Jaycees has a first amendment right to determine the composition of its membership. In the absence of such a freedom, equality of membership for women infringes upon no associational right of the Jaycees.

such intrusion would impair the state's regulatory interest "only to a limited extent." App. at 28. The court noted that "places of public accommodation in the ordinary sense of business establishments" remain subject to "the full vigor of the law It is only the Jaycees' membership practices that would be affected if this particular application of the state public accommodations law is prohibited." *Id.* The Jaycees' sexually discriminatory sale of memberships would, however, remain undisturbed. As Judge Lay correctly noted in dissent, this circular reasoning "rests upon an implied disagreement with the findings of the Minnesota Supreme Court that the Jaycees is a statutory 'place of public accommodation.'" *Id.* at 42-43. It is precisely the sale of membership by a public accommodation which the state seeks to regulate. To say, in effect, that women can still buy such items as food and clothes unreasonably narrows the state's interest in having all public accommodations open to women by judicially picking and choosing which ones should be open.

Second, the lower court found that the state's interest was diminished because it had not shown "that membership in the Jaycees was the only practicable way for a woman to advance herself in business or professional life." App. at 28.¹⁴ The

¹⁴ As a practical matter it is probably impossible to identify from among the myriad of events in an individual's life a solitary decision or action which guarantees an advance in one's career. See generally C. Jencks, *Inequality—Reassessment Of The Effect Of Family And Schooling In America*, 191-92 (1972) (Predicting a man's occupational status is like predicting his life expectancy: certain measurable factors make a difference, but they are by no means decisive). At the administrative hearing, three businesswomen testified that the training, experience, and recognition which they received as members of the Minneapolis or St. Paul Jaycees contributed to success in their respective careers. HRT 1 at 190-195, 199-212. One woman indicated that when she inquired about advancement in her company, she was told that she should join the Jaycees. She did so and was subsequently promoted. *Id.* at 210-212.

lower court's suggestion that it would view the state's interest as more compelling if the Jaycees was the only reasonable way for a woman to advance herself in business misapprehends the purpose of the public accommodations provision of the Human Rights Act. The transcendent state goal which it is designed to ensure is equality of access to commercial activity, not the success of a particular racial, sexual, or ethnic group in a given walk of life. While participation in the Jaycees and in Jaycees training is no doubt one avenue to success in the business world, it is but one of many commercially available opportunities for men and women to better themselves. The state need not therefore have to demonstrate that the Jaycees represents the sole route to advancement for professional women.¹⁵

Moreover, in addition to taking a myopic view of the state's interest, the supposition that there are other avenues of professional advancement is based upon the moribund theory of "separate but equal." This notion of racial equality has rightfully been assigned to the constitutional graveyard¹⁶ and should not now be resurrected and used to deprive women of equal opportunity.

¹⁵ One attribute of discrimination is that it is based upon stereotypical notions of one group by another. The Jaycees portrays itself as a breeding ground for tomorrow's leaders. *See, e.g.*, Comp. Exh. 99 at 7. If the state has a compelling interest in eliminating discrimination, it has an equal interest in ensuring that the formative experiences of future leaders include men and women working as equals on projects of leadership, development, community service, and civic betterment such as are engaged in by the Jaycees. Jaycees' by-laws which relegate women to followers and elevate men to leaders solely on the basis of an immutable characteristic are antithetical to that interest.

¹⁶ *Bob Jones University v. United States*, 103 S. Ct. 2017, 2029 (1983). *But cf. Vorchheimer v. School District of Philadelphia*, 430 U.S. 703 (1977), *aff'd by equally divided court* 532 F.2d 880 (3rd Cir. 1975).

Another factor which, in the opinion of the lower court, diluted the state's interest was its belief that the public accommodation provision of the Minnesota Human Rights Act was being applied "selectively" to the Jaycees and not to any of the "hundreds of private (in the sense of nongovernmental) associations in this country whose membership is limited to either men or women." App. at 29. The record does not permit the conclusion that any one of these "private associations" is a public accommodation. In fact, the hearing examiner rejected such a comparison between the Jaycees and the Kiwanis for precisely this reason. App. at 122-123.¹⁷ Although the record adequately demonstrates why the Jaycees is a public accommodation, it is empty of sufficient facts to permit this designation of any other organization and hence of support for the lower court's conclusion that the Jaycees was selectively prosecuted.¹⁸

Finally, the lower court indicated that state objectives could be met by use of less restrictive alternatives, "ways less di-

¹⁷ Evidence on the Kiwanis, for example, consisted of its constitution and by-laws, a 1977 roster of its Minneapolis members, and a thumbnail sketch of it in 1 *Encyclopedia of Private Associations* (15th ed. 1980), Gale Research Co.; Res. Exhs. A and B; P. Exh. 25 at 748. Moreover save for the encyclopedia descriptions, evidence concerning other purported "private associations" was limited to the by-laws/policies, standing rules and procedures of the Association of Junior Leagues, Inc., the International Association of Lions Clubs' constitution and by-laws, the constitution of Rotary International organization, and the constitution and by-laws of Optimists International. Res. Exhs. C, D, E, F, and G. See App. at 123.

¹⁸ This claim was made but never pursued by the Jaycees in the trial court. *United States Jaycees v. McClure*, 534 F. Supp. 766, 768, n. 6 (D. Minn. 1982), App. at 56. That court also concluded that the record before it contained insufficient evidence as to the activities of groups such as the Kiwanis "to allow any determination whether the statute would apply to them and whether . . . [they] engage in protected First Amendment activity." *Id.* at 67.

rectly and immediately intrusive on the freedom of association than an outright prohibition", i.e., no tax credits, no membership or appearances by public officials. App. at 29-30. A properly designated "less restrictive alternative" is one which allows attainment of an objective in a manner which minimizes infringement on a first amendment activity, e.g., reasonable time, place or manner restrictions on picketing as opposed to a ban on all such activity. The methods suggested by the court are thus not less restrictive alternatives, they are merely less effective ones.

The interest of the state in providing equality of access to the market place is clearly compelling, one which justifies an abridgement of first amendment freedoms of the kind asserted by the Jaycees.

III. THE MINNESOTA SUPREME COURT'S OPINION IN MCCLURE V. UNITED STATES JAYCEES DOES NOT CREATE AN UNCONSTITUTIONALLY VAGUE DISTINCTION BETWEEN PUBLIC ACCOMMODATIONS AND PRIVATE MEMBERSHIP ORGANIZATIONS.

The lower court concluded that the Minnesota Supreme Court introduced an unconstitutionally vague standard into the public accommodations provision of the Minnesota Human Rights Act because its opinion in the *United States Jaycees v. McClure*,¹⁰ "supplies no ascertainable standard for the inclusion of some groups as 'public' and the exclusion of others as 'private.'" App. at 41. The lower court did not find the statutory phrase "place of public accommodation" to be vague. Instead, it assigned that vice to the Minnesota Supreme Court's interpretation of it. The lower court was clearly in

¹⁰ App. at 69-92.

error.²⁶ The opinion of the Minnesota court was clear and unambiguous.

The holding of the Minnesota court and the standard which emerges from the opinion is that an organization that sells goods and privileges in exchange for membership fees, which solicits and recruits its members on an unselective basis from the public at large and which does so at various sites within Minnesota is a "public accommodation" within the Minnesota Human Rights Act. App. at 77-91.

In arriving at this conclusion, the Minnesota court made a detailed three-prong analysis of the facts before it:

Our examination of the national organization (and its local affiliates) proceeds along three lines set out in Minn. Stat. § 363.01 (18) (1980): (1) is the national organiza-

²⁶ The vagueness test which should be used in this case is one applied to statutes not defining criminal conduct or regulating first amendment privileges in a criminal context and was established in *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925). In that case the Court rejected the idea that only a criminal statute could be unduly vague and established that the rule or standard of conduct at issue must not be "*so vague and indefinite as really to be no rule or standard at all.*" *Id.* at 239 (emphasis added). *Accord* *Boutiller v. Immigration and Naturalization Service*, 387 U.S. 118, 123 (1967).

The *Small* standard is appropriate in this case since this case involves neither a criminal prosecution nor a first amendment privilege. Although the public accommodations provision of the Human Rights Act has a criminal component, Beck's injunction resulted from a civil proceeding. Moreover there is no indication that a criminal prosecution is either pending or threatened.

Finally, it is not clear that the Jaycees would be a public accommodation for the purpose of enforcing the provision of the Human Rights Act which makes it a misdemeanor to discriminate in that area on the basis of sex. Minn. Stat. § 363.101 (1982). Minnesota law permits a two-prong construction of a statute containing civil and criminal components. The former can be construed liberally, the latter strictly. *State v. Moseng*, 245 Minn. 263, 268, 95 N.W.2d 6, 11 (1959).

tion a *business* in that it sells goods and extends privileges in exchange for annual membership dues?; (2) is the national organization a *public* business in that it solicits and recruits dues-paying members but is unselective in admitting them?; and (3) is the national organization a public business *facility* in that it continuously recruits and sells membership at sites within the State of Minnesota?

App. at 77-78 (emphasis in original).

On the first prong of the analysis, the Minnesota court found that the Jaycees was a business within the meaning of the Act because the Jaycees regarded "its members more as customers than as owners," *id.* at 78, and treated its memberships as a "product" to be sold. It was thus a "business." *Id.* at 79-80.

On the second prong of the analysis, the Minnesota court looked to analogous case law construing public accommodation statutes as to whether a group is public or private.²¹ The court derived from the cases two principal characteristics of non-public organizations: selectivity in choosing members and limitations on the size of membership. *Id.* at 82-84. Since neither of these exist in the Jaycees organization, the court found that the Jaycees was not private, concluding that "[b]y virtue of its unselective, vigorous sale of memberships, the

²¹ The Jaycees' attempt to portray itself as not open to the public is similar to claims made by numerous other organizations. The litigation which has emerged from this aspect of civil rights law has left a well-established body of decisional law on the distinction between public accommodations and private clubs. *See Wright v. Salisbury Club*, 632 F.2d 300, 311, 313 (4th Cir. 1980) (42 U.S.C. § 1981); *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131-133 (5th Cir. 1980) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (b)(2)); *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174, 1175-76 (E.D. Wisc. 1979) (Title II, 42 U.S.C. § 2000a (e)); *Fesel v. Masonic Home of Delaware, Inc.*, 428 F. Supp. 573, 577-78 (D. Del. 1977).

national organization is a *public* business." *Id.* at 85 (emphasis in original).

On the third prong of the analysis, the Minnesota court found that the Jaycees was a business facility within the Act because it had a fixed business site at the affiliated state organization's headquarters in Minnesota and mobile sites in the sometimes door-to-door, company-to-company solicitation of members. *Id.* at 89-90.

The holding and analysis of the Minnesota court is clear, unambiguous, and articulate.

The vagueness argument of the Jaycees, which was accepted by the lower court, is predicated not upon the reasoning of the opinion as a whole, but upon a remark made in connection with the second prong of the supreme court's analysis in which it was addressing one of the arguments of the Jaycees that it was a private organization. The remark was:

Private associations and organizations—those, for example, that are selective in membership—are unaffected by Minn. Stat. § 363.01 (18) (1980) [the definition of a public accommodation]. Any suggestion that our decision today will affect such groups is unfounded.

We, therefore, reject the national organization's [Jaycees] suggestion that it be viewed analogously to private organizations such as the Kiwanis International Organization. Instead, we look at what this national organization is by itself.

App. at 83. See App. at 39.

In making this remark, the supreme court was not holding that the Kiwanis is private. Instead it was addressing and rejecting a contention of the Jaycees. The Jaycees argued that its organization and methods of operation were similar to that of the Kiwanis which it characterized as private. The supreme court rejected the analogy because the record showed the

Jaycees to be public. The court merely rejected the "suggestion that it [Jaycees] be viewed analogously to private organizations such as the Kiwanis International Organization." It rejected the whole suggestion and in so doing it was not necessary that it find that the Kiwanis was private. It did not. Instead it focused its attention on the facts of the Jaycees and whether it was public. This rejection of the Jaycees' contention²² hardly creates an ambiguity in view of the clear holding of the court.

Even if the Minnesota court in rejecting the Jaycees' contention did create some ambiguity, it was inappropriate for the lower court to enjoin the application of the Minnesota Human Rights Act to the Jaycees. Nowhere in its opinion did the lower court hold that as it presently operates, the Jaycees is not a public accommodation within the meaning of the Human Rights Act. At best, the court held that in some hypothetical mode that organization might operate in a manner which would leave it uncertain as to whether it would be considered open to the public. Therefore because the Human Rights Act now prohibits the conduct in which the Jaycees is engaged, that organization cannot challenge the statute for vagueness on the basis that its future conduct or the conduct of some other organization might not clearly fall within its scope. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *Parker v. Levy*, 417 U.S. 733, 755-56 (1974).

²² This same argument was made to the administrative hearing examiner who rejected it on the basis that there was insufficient evidence to support the comparison. See App. at 105, 122-123. Moreover, at the district court, the Jaycees contended that the Minnesota Supreme Court's interpretation of the statute made it applicable to organizations such as the Boy Scouts and the Kiwanis. Judge Murphy noted that there was "insufficient evidence in the record pertaining to the activities of these groups to allow any determination whether the statute would apply to them and whether the groups engage in protected First Amendment activity." App. at 67.

By enjoining the present application of the statute, the lower court has improperly granted standing to a hypothetical Jaycees organization and issued erroneously what is in effect an advisory opinion indicating that this organization is being subjected to an unconstitutionally vague statute.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the court of appeals and should remand this case for proceedings consistent with this Court's opinion.
February 23, 1984

Respectfully submitted,

HUBERT H. HUMPHREY, III

Attorney General

State of Minnesota

KENT G. HARBISON

Counsel of Record

Chief Deputy Attorney General

102 State Capitol Building

St. Paul, MN 55155

Telephone: (612) 296-2351

Counsel for Appellants

Of Counsel:

THOMAS R. MUCK

Deputy Attorney General

RICHARD S. SLOWES

Assistant Attorney General

RICHARD L. VARCO, JR.

Special Assistant

Attorney General

State of Minnesota

No. 83-724

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IN THE
Supreme Court of the United States

October Term 1983

KATHRYN R. ROBERTS, Acting Commissioner,
Department Of Human Rights; HUBERT H.
HUMPHREY III, Attorney General of the State of
Minnesota; and GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of itself and its
qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF APPELLEE,
THE UNITED STATES JAYCEES

CARL D. HALL, JR.
Counsel of Record
6935 South Delaware Place
Tulsa, Oklahoma 74136
Telephone: (918) 492-6600

CLAY R. MOORE and
MACKALL, CROUNSE &
MOORE

1600 TCF Tower
Minneapolis, Minnesota 55402
Telephone: (612) 333-1341
Counsel for Appellee

QUESTIONS PRESENTED

1. Whether application of Minnesota's public accommodation law to the Jaycees interferes with the Jaycees' constitutional right of association without a sufficient showing of compelling state interest.

2. Whether the Minnesota public accommodation law is void for vagueness as applied.

3. Whether the Minnesota public accommodation law is void for overbreadth as applied.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	v
Explanation of Record References	viii
Statement of the Case	2
Summary of Argument	9
Argument	11
I. The Application Of Minnesota's Public Accommo- dation Law To The Jaycees Interferes With The Jaycees' Constitutional Right Of Association	11
a. The State's Action Would Destroy the Jaycees' Ability to Achieve its Purpose	11
b. The Constitutional Nature and Basis of the Right of Association	16
c. Rights of Association and Rights of Expres- sion and Assembly are Inseparable in Concept and in Practice	19
d. The Jaycees Associate Member Status	22
e. The Right of Association is not Limited to Organizations with Selective Membership Policies	24
f. The Court's Decisions in Norwood and Runyon are Inapposite	25

	<u>Page</u>
II. The State Has Failed To Demonstrate A Compelling Governmental Interest	26
III. Vagueness, Overbreadth, And Equal Protection ..	34
Preface	34
a. The Minnesota Statute is Unconstitutionally Vague	35
b. The Minnesota Statute is Impermissibly Overbroad	43
Associations Confined to Persons of One "Creed" ..	46
Women's Associations	46
Ethnic Associations	47
Private Associations Based on Religious Belief ..	47
Conclusion	49

TABLE OF AUTHORITIES

	Page
<i>Statutes:</i>	
Cal. Civ. Code §51	48
Minn. Stat. §363.01, Subd. 18	6, 45
Minn. Stat. §363.03, Subd. 3	6, 45, 46
Minn. Stat. §363.05, Subd. 1(10)	42
Minn. Stat. §363.06, Subd. 2	42
Minn. Stat. §363.071 (2)	35, 42
Minn. Stat. §363.091	35
Minn. Stat. §363.101	35, 42
Minn. Stat. §609.02, Subd. 3	42
42 U.S.C. §1981	25
42 U.S.C. §2000a(e)	40
 <i>Cases:</i>	
Abood v. Detroit Board of Education, 431 U.S. 209, 231 (1977)	15
Bigelow v. Virginia, 421 U.S. 809 (1975)	43
Broaderick v. Oklahoma, 413 U.S. 601 (1973)	43
Brown v. Hartlage, 456 U.S. 45 (1982)	43
Buckley v. Valeo, 424 U.S. 1 (1976)	26
Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)	42
Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (Conn. 1974)	40

	Page
Cousins v. Wigoda, 419 U.S. 477 (1975)	24
Curran v. Mt. Diablo Council of Boy Scouts, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), Pet. for hearing denied by California Supreme Court, Jan. 6, 1984, 4 Adv. Cal. 29	48
Elrod v. Burns, 427 U.S. 347 (1976)	26, 29, 44
Gibson v. Florida Investigation Committee, 372 U.S. 539 (1963)	16
Gilmore v. City of Montgomery, 417 U.S. 556 (1974)	15, 16, 18, 25
Gooding v. Wilson, 405 U.S. 518 (1972)	44, 49
Grayned v. City of Rockford, 408 U.S. 104 (1972)	35
Griswold v. Connecticut, 381 U.S. 479 (1965)	18, 19
Healy v. James, 408 U.S. 169 (1972)	24
Heffron v. Int'l. Soc. For Krishna Consc., Inc., 452 U.S. 640 (1981)	27
Junior Chamber of Commerce of K.C., Mo. v. Missouri St. J. C. of C., 508 F.2d 1031 (8th Cir. 1976)	25
Larson v. Valente, 456 U.S. 228 (1982)	27, 30, 44
Meyer v. Nebraska, 262 U.S. 390 (1922)	18
NAACP v. Alabama, 357 U.S. 449 (1958)	14, 17, 24

	Page
NAACP v. Button, 371 U.S. 415 (1963)	27
Nesmith v. Young Men's Christian Ass'n. of Raleigh, N.C., 397 F.2d 96 (4th Cir. 1968)	40
Norwood v. Harrison, 413 U.S. 455 (1973)	25
O'Connor v. Village Green Owners Assn., 663 P.2d 427	48
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)	35
Pierce v. Society of Sisters, 268 U.S. 510 (1924)	18
Poe v. Ullman, 367 U.S. 497, 543 (1961)	19
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	17
Roe v. Wade, 410 U.S. 113 (1972)	18
Runyon v. McCrary, 427 U.S. 160 (1976)	15, 25
Shelton v. Tucker, 364 U.S. 479 (1960)	17
Smith v. Goguen, 415 U.S. 566, 573 (1974)	42
United States v. Cardiff, 344 U.S. 174 (1952)	35
United States Jaycees v. McClure, et al., 305 N.W.2d 764 (1981)	6
Williams v. Rhodes, 393 U.S. 23 (1968)	17

	Page
Winters v. New York, 333 U.S. 507 (1948)	35, 36
Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970)	40

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Vagueness-Noncriminal Statutes, 40 L.Ed. 2d 823	43
Democracy in America, de Toqueville (Lawrence Translation, Harper & Row, 1966)	14

Explanation of Record References

References to the appellant State's Appendix filed with its Jurisdictional Statement are, e.g. A-83. References to the supplementary Joint Appendix are, e.g. JA-10.

Transcript references are noted herein as *Tr. I*, p. —, referring to the transcript of testimony before the state hearing examiner in April of 1979. References to *Tr. II*, p. —, are to the testimony taken before the district court in August 1981.

The Jaycees' exhibits in the state hearing examiner's hearing are by letter (Exhs. A through J). Jaycee exhibits introduced in the district court are by number (Pl. Exhs. 1 through 26).

IN THE
Supreme Court of the United States

October Term 1983

No. 83-724

KATHRYN R. ROBERTS, Acting Commissioner,
Department Of Human Rights; HUBERT H.
HUMPHREY III, Attorney General of the State of
Minnesota; and GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of itself and its
qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF APPELLEE,
THE UNITED STATES JAYCEES

STATEMENT OF THE CASE

The United States Jaycees ("Jaycees") is a tax-exempt nonprofit, Missouri corporation, headquartered in Tulsa, Oklahoma. It was founded in St. Louis, Missouri, in 1920, under the name United States Junior Chamber of Commerce. Its name was changed to The United States Jaycees in 1965. It is a private (in the sense of nongovernmental) membership organization (Exh. H, I, J, Tr. I 8, 36). It derives income primarily from membership dues and private sponsors. It receives no federal or state funds (Pl. Exh. 20, Tr. II 42-45). Article 2 of the Jaycees' Bylaws (Pl. Exh. 1, Tr. II 10) sets out the organization's purpose:

A. This Corporation shall be a nonprofit corporation, organized for such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.

B. Towards these ends, this Corporation shall adopt the following as its Creed:

We believe

That faith in God gives meaning and purpose to human life;

That the brotherhood of man transcends the sovereignty of nations;

That economic justice can best be won by free men
through free enterprise;

That government should be of laws rather than of men;

That earth's great treasure lies in human personality;

And that service to humanity is the best work of life.

Article 4 of the Bylaws creates seven classes of membership, including Individual Members, also known as regular members, Associate Individual Members, Local Organization Members (local chapters), and State Organization Members (State chapters such as Minnesota, Alaska, etc.).

Individual Membership is equivalent to full or regular membership and is defined as "young men between the ages of eighteen (18) and thirty-five (35)" (Pl. Exh. 1, Bylaws 4-2). The category of Associate Individual Member is reserved for those, including women, who do not qualify for regular membership (Pl. Exh. 1, Bylaw 4-3). This category does not have the right to vote or serve as officers. The Bylaws require that local chapters be "young men's organizations of good repute . . . organized for purposes similar to and consistent with those" of the national organization (Pl. Exh. 1, Bylaw 4-4). At the time of trial in August 1981, the Jaycees had about 295,000 regular members in 7,400 local chapters. Associate Members of all types numbered only 11,915 (Pl. Exh. 21, Tr. II 45).

The subject of full membership for women has been a matter of intense debate and discussion within the Jaycees. The national Jaycees convention voted in 1975 by a margin of about 90% to 10% against changing the Bylaws to allow local chapters to admit women as regular members. The 1978 national convention rejected the admission of women on a local option basis 78% to 22% (See Beck's Finding No. 13, A-99).

In a national referendum in September of 1981, Individual Members of the Jaycees defeated another proposed local option amendment by a vote of 67% to 33% (Pl. Exh. 26).

From its inception in 1920, the Jaycees has adopted and implemented thousands of programs to carry out the purposes for which it was organized (Tr. II, p. 37). A sample of these include efforts to assist children afflicted with diabetes (Pl. Exh. 18, Tr. II 37); shooting education (Pl. Exh. 17, Tr. II 35); fundraising for treatment for muscular dystrophy (Pl. Exh. 17, Tr. II 35); Junior Athletics (Pl. Exh. 18, Tr. II 37); and programs to encourage participation in government (Pl. Exh. 12, Tr. I 31). In addition, the Jaycees has taken public positions on a variety of national issues. It has favored the right to vote for citizens of the District of Columbia; urged revision of AAU standards; supported congressional legislation to change the method of computing pay for members of the armed forces; supported the Uniform Vehicle Code; endorsed the Mutual Security Program which gave assistance to underdeveloped nations to develop economic and social stability; urged federal tax reform and corresponding economy in government; urged repeal of the excise tax on telephone service; urged preservation of wilderness areas for use in recreational and scientific purposes; urged electoral college reform; opposed legislation introduced favoring socialized medicine; supported the right of 18-year-olds to vote; supported the withdrawal of American combat forces from Southeast Asia. Where appropriate, the Jaycees has adopted specific programs to implement its position on national issues. For example, in 1981, the Jaycees adopted and implemented its program "Enough is Enough" designed to assist the current administration's economic policy (Pl. Exh. 6, Tr. II 23). The "Enough is Enough" program has been distributed to all lo-

cal chapters of the Jaycees. The Jaycees supported and actively sought statehood for Alaska and Hawaii, and publicly urged the implementation of the Hoover Commission recommendations (Pl. Exh. 3, Tr. II 13-17, 23, 37, 40).

The Jaycees believes in leadership training for young men. It believes that its objectives can best be accomplished by involving young men in the mainstream of American social action and political thought. State and Local Organization Members, consistent with these policies, have likewise adopted the philosophy that the training of young men includes involvement in controversial public issues of the times. As a consequence, Local and State Organization Members of the Jaycees have urged the legislatures of their respective states to call for an amendment to the United States Constitution to require a balanced federal budget (Pl. Exh. 7, Tr. II 24). The Montana Jaycees and the Montana Civil Liberties Union successfully sought passage of legislation dealing with employment restrictions for ex-offenders. The Annandale, Virginia, Jaycees worked for passage of increased benefits for low-income families; the Maryland Jaycees in 1973 pushed for a law permitting full voting rights for ex-offenders; in 1964, the Atlanta Jaycees filed suit against the State of Georgia in Federal District Court challenging the reapportionment of congressional districts (Tr. II 28; Pl. Exh. 19).

The Jaycees publishes a magazine called "Future," which is furnished to every Jaycees member (Tr. II 12). The editors of "Future" have made it a practice to include articles on issues of public concern. The magazine offers an opportunity for the Jaycees to speak out on controversial issues of national importance (Tr. II 21). "Future" articles include the January 1980 article on the Jaycees' stand on socialized medicine; coverage in June of 1964 of a national Jaycees officer's testimony

before a congressional committee on the Herlong-Baker Tax Reform Bill; an article supporting national tax reform (Pl. Exhs. 4 and 22).

The Jaycees is therefore a multi-faceted organization engaged in a variety of internally and externally directed programs, including a significant involvement in the development of collective organizational positions on matters of national concern, some of them highly controversial, such as the "school prayer" amendment (Pl. Exh. 3, p. 4). All of this activity, external and internal, springs from the core purpose of the Jaycees, which is to advance the interests of young men only, through participation in the internal affairs of the organization and in the affairs of their communities. It is in a real sense a representative voice of young men in America.

Minnesota law forbids discrimination on the basis of sex, race, religion, etc. in "places of public accommodation." (Minn. Stat. § 363.01, Subd. 18 and § 363.03, Subd. 3). The Supreme Court of Minnesota interpreted this statutory phrase to apply to the Jaycees thereby effectively affirming the State Hearing Examiner's injunction prohibiting the Jaycees from enforcing its membership bylaws in Minnesota. (See *The United States Jaycees v. McClure, et al.*, 305 N.W.2d 764 (1981), reprinted at A-69, and order of hearing examiner at A-93). The Court of Appeals concluded that the application of the Minnesota statute to the Jaycees was invalid on two alternative and independent grounds:

1. It directly interfered with the Jaycees First Amendment right of association without a sufficient showing of compelling governmental interest, and

2. The Minnesota statute was void for vagueness as interpreted and applied, because it provided no ascertainable standard for determining whether an organization was exempted as "private" or included as "public." (A-41.)

The labels pinned on the Jaycees by the State are misleading and if not recognized for what they are, serve only to obscure the constitutional analysis called for by the facts of this case.

The assertions that the Jaycees "sell" a "product" for a "fee" are applicable to every membership organization in America, all of which have something of value to "sell" or they would cease to exist and all charge a "fee" (dues) to cover their expenses of operation. The Jaycees is but one of several civic oriented organizations which are similarly organized and which have membership restrictions based on gender. (Beck Finding No. 24, A-105). A few examples are the Rotary, Lions, Kiwanis, and Optimists, which restrict their membership to men, and the Junior League and PEO Sisterhood which restrict their membership to women. (Jaycees' Exhs. A, B, C, D, E, F, and G, Tr. I 66; Pl. Exh. 24.) *The Encyclopedia of Associations* (Pl. Exh. 25) lists a staggering number of membership organizations having membership restrictions based on sex, national origin, or religious affiliation, or a combination thereof. Minn. Stat. § 363.03(3) prohibits discrimination by reason of "race, color, creed, religion, disability, national origin or sex" if an entity should be designated a "place of public accommodation" pursuant to § 363.01, Subd. 18. All of these organizations could be as accurately, or inaccurately, described as "selling" memberships. That description does nothing to facilitate the analysis of the constitutional issues presented.

In this connection the Jaycees has also been described as "generally open to the public" (see Brief of amici California). As the Court of Appeals noted, this is an overstatement. The Jaycees is not "... a cross section of the community, even of the young male community" (A-26). People tend to associate with people of like interests and common background. Each of the thousands of local chapters of all of the major volunteer

associations—male and female—necessarily develops its own character and composition. For example, the St. Paul Jaycees Chapter, which recently withdrew from the Jaycees, now calls itself "Community Business Leaders" (it has filed an amicus brief).

As the Court of Appeals stated: "The Jaycees is a genuine membership organization, whose members govern its affairs and decide its policies, not just a vehicle for the delivery of commercial goods and services" (A-25). Its constitutional rights and those of its members must be adjudged in that light rather than in the light of loose terminology appropriate only to restaurants, hotels and department stores.

SUMMARY OF ARGUMENT

The United States Jaycees is a nonprofit organization which limits its voting members to young men. Its purpose is to provide young men with an opportunity for personal development and achievement through participation in the affairs of their community, state and nation. It serves as a spokesman for young men and speaks out on controversial issues.

The State of Minnesota by applying its public accommodation law to the Jaycees would effectively destroy the Jaycees' ability to achieve its core purpose, namely, furthering the interest of young men. The Jaycees would no longer be able to confine the central reason for its existence to the advancement of the interest of young men, but must also serve the interests of young women.

The State's action in ordering the Jaycees to admit women in contravention of its by-laws directly interferes with the Jaycees' constitutional right of association. This Court's decisions have made it clear that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment; that the right to associate is more than the right to attend a meeting, and that it includes the right to express one's attitudes by membership in a group organization for an almost infinite number of purposes. The decisions of this Court have never limited the right of association to private clubs, small groups or associations with selection membership.

The right of association is a basic constitutional freedom. If the State is to infringe upon the Jaycees' freedom to choose its associates, it must demonstrate a compelling interest in prohibiting the Jaycees from confining its voting member-

ship to young men. The State has not met its burden in this case. It cannot satisfy that burden by affixing the label "public accommodation" to the Jaycees.

Nothing in the record or common experience demonstrates that voting membership in the Jaycees is essential for the professional or business success of men or women.

The Minnesota Supreme Court's decision that the Minnesota public accommodation law will apply to "public" organizations like the Jaycees but not to "private" organizations like the Kiwanis renders the statute so vague and overbroad that no person of ordinary intelligence would have a clue whether a given organization is or is not a "public accommodation" subject to the civil and penal sanctions of the Minnesota law.

The Court of Appeals was correct in holding that the Minnesota public accommodation law is unconstitutional on two alternative and independent grounds:

1. It directly interferes with the Jaycees' constitutional right of association without a sufficient showing of compelling governmental interest, and
2. The Minnesota statute is void for vagueness as interpreted and applied, because it provides no ascertainable standard for determining whether an organization is exempted as "private" or included as "public" (A-41).

ARGUMENT

I. THE APPLICATION OF MINNESOTA'S PUBLIC ACCOMMODATION LAW TO THE JAYCEES INTERFERES WITH THE JAYCEES' CONSTITUTIONAL RIGHT OF ASSOCIATION.

a. The State's Action Would Destroy the Jaycees' Ability to Achieve its Purpose.

At the outset, it is essential that the purpose of the United States Jaycees be re-emphasized. Article 2 of the Jaycees' By-laws (Pl. Exh. 1) defines that purpose as follows:

A. This Corporation shall be a nonprofit Corporation organized for such educational and charitable purposes as will promote and foster the growth and development of *young mens* civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplemental educational institution to provide *them* with opportunity for personal development and achievement and an avenue for intelligent participation by *young men* in the affairs of their community, state and nation, and to develop true friendship and understanding among *young men* of all nations.

(Emphasis supplied.)

The core purpose of the Jaycees, therefore, is to provide *young men* only with the benefits of participation in organizational activities directed to civic purposes. That purpose by definition requires that membership be restricted to young men, the only effective expression of the underlying belief that young men, as a class, need or deserve such an organization.

The limited service purpose of the Jaycees equates precisely with the purposes of hundreds of organizations, including a number of opposing amici.¹ Some allow membership to those outside of the target class, although probably only on a token basis, but most do not.

The vast majority of private associations are formed, not to serve the interests of all, but to concentrate on the perceived special interests of a limited class. Most have decided that their purpose is best served by confining their membership to persons of that class—most frequently defined by sex, race, national origin, religious belief or age, combinations thereof.

The fact that full participation in the Jaycees' affairs provides benefits is undeniable but irrelevant. Those same benefits are available to women in a myriad of organizations. The real issue is whether a membership organization composed of private persons may, without government interference, confine its purpose to providing beneficial service to something less than the whole of society, defined by gender, race, national origin, etc. and by limiting its membership accordingly. The case must necessarily be viewed in the same light as if the State attempted to prevent the formation of an organization composed solely of Black persons or Jews or women or Norwegians or Vietnamese for the purpose of improving the lot of those individuals. The issue must be framed this broadly because once an organization is labeled a "place of public accommodation" under Minnesota law, its membership restrictions based on race, national origin, creed, religion, or sex are equally con-

¹ See, for example, amici brief of N.O.W. and 14 other organizations confining their purposes to matters of concern to women and in two cases to Black lawyers and to Jews. Most of these groups also confine their memberships accordingly.

demned. See Minn. Stat. § 363.03, Subd. 3. The law of the State of Minnesota as it presently stands means that, if the State chooses to affix the label "place of public accommodation", all-female groups may be forced to serve the interests of men, all-Black groups may be compelled to take on the burden of serving the special interests of white people, and ethnic groups may be prevented from confining their membership to the only persons who would have an interest in the unique traditions of those groups—depending only on the whims of the State. In short, the lawful core purposes of those groups are in jeopardy for no defensible reason.

It may be true that many activities of the Jaycees would be ostensibly unaffected by the forced inclusion of women, but this avoids the real issue. The State has dictated by a penal statute that the Jaycees must abandon its lawful core purpose by also serving the interests of young women. Insofar as the interests of young men and young women may conflict (a not unlikely event in light of current sociological trends), the internal damage to the organization would become apparent. In principle, the State's assumption of this power is no different than if it dictated to the NAACP that it must also devote its energies to those matters of particular interest to white people as a group separate from Black people.

The external differences between a purely young mens association and an association composed of both young men and young women may be subtle or dramatic, but there is undeniably a difference, and that difference must inevitably reflect itself in the priorities of that organization in the development of its programs and public stances. The power to change the membership of a bona fide private association is unavoidably the power to change its purpose, its programs, its ideology, and its collective voice.

The American propensity to form private associations for a bewildering variety of purposes, important or otherwise, is unique and reflects a pluralistic society. In the early 19th Century, Alexis de Toqueville observed:

Americans of all ages, all stations in life, and all types of dispositions are forever forming associations . . . of a thousand different types, religious, moral, serious, futile, very general and very limited, immensely large and very minute.

Democracy in America, de Toqueville, p. 485 (Lawrence Translation, Harper & Row, 1966). The State seeks a rule of constitutional law which would stifle this pluralism in the name of a misbegotten concept of egalitarianism. Most women do not care about the Jaycees all-male policy; most women would be seriously disturbed to find that their women's associations may not, at the fiat of the states, be able to continue as all-female. The same is true of racially, religiously and ethnically restricted associations which constitute another pluralistic dimension. Where the purposes of these organizations are linked to their membership composition, the power sought by the State is the power to destroy those purposes. The root question presented here is whether this culturally rich society is to be subjected to this threat.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court had no difficulty in preventing a state from stifling the purpose of the NAACP by forced disclosure of its membership. This indirect use of state power to reduce active NAACP membership by intimidation, and by doing so, to cripple its lawful purpose, could not be sustained. Minnesota has not proceeded so subtly; it has bluntly ordered the Jaycees to abandon its otherwise lawful purpose.

The fact that the Jaycees' central purpose may not, in this period of history, appear as important as that of the NAACP provides no invitation to state power. Justice Harlan stated in *NAACP v. Alabama*, supra, that the nature of the beliefs sought to be advanced by association was "immaterial", 357 U.S. at 460. Expression by association is fully protected whether it involves "philosophical, social, artistic, economic, literary or ethical matters—to take a nonexhaustive list of labels." *Aboud v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) (Stewart J.).

Sprinkled throughout the opposing briefs are references to "invidious discrimination" as applied to the Jaycees' all-male policy. The term is used in such cases as *Runyon v. McCrary*, 427 U.S. 160 (1976), and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), against a backdrop of racial discrimination. The use of this term is apparently intended to suggest that the Jaycees' all-male membership policy is somehow immoral and unsavory and therefore not entitled to protection against the State's police powers.

The Jaycees have not quibbled about the term "discrimination" as a description of its all-male policy. In a mechanical sense, the exclusion of women, men over 35, and children under 18 from voting membership is discriminatory, although not from mean-spiritedness toward those excluded groups. The hordes of private associations which have determined to advance the interests of their favored groups are "discriminatory" in this sense although hardly "invidious." If by "invidious" is meant a certain ugly state of mind by the in-group to demean or humiliate the excluded groups, the Jaycees' policy is no more invidious as to women than it is as to the older men or children who are also excluded. The fact that a few activists do not like the policy does not convert a benign exclusion into an invidious discrimination.

The policy of the Jaycees is not so much exclusionary or discriminatory as it is a desire to focus its thrust upon the interests of young men. The P.E.O. Sisterhood's and Junior League's all-female restrictions (Pl. Exh. 25, p. 549, 747) are likewise borne of the same benign intention, as are the so-called "discriminatory" policies enforced by hundreds of worthwhile associations. Attempts to tar the Jaycees with the brush of "invidious discrimination" appears to have originated in a racial discrimination context and then only if the all-white policy is state-sponsored or is perpetrated in the unique circumstances involved in *Runyon*, supra. It has no application here, and the degree of constitutional protection afforded the Jaycees' benign policy cannot be diminished by such labels. There is nothing immoral or unsavory about an organization which limits its membership to all women, all Blacks, all Norwegians, all Irish, or all men. *Gilmore v. City of Montgomery*, supra, at 575. See also Justice Douglas' concurring opinion in *Gibson v. Florida Investigation Committee*, 372 U.S. 539 at 559.

b. The Constitutional Nature and Basis of the Right of Association.

At the heart of the State's argument is the assertion that the right of association exists only as a subordinated right to the express guarantees of freedom of speech, religion, assembly and petition and that the Jaycees are obligated to prove that its voice would be changed if women were granted full membership. Thus the State argues that the Jaycees, as an organizational entity, is as physically capable of exercising those express guarantees with the presence of women as full voting members as it is in its all-male composition. In a strictly mechanical sense, it is possible that the Jaycees his-

torically could have developed the same programs and the same positions on matters of public and political concern as a mixed young peoples organization rather than as a purely male association, but this misses the point. This view also misconstrues the prior decisions of this Court and betrays a lack of understanding of the inseparable nexus between the right of association and the exercise of the expressly guaranteed rights.

It must be taken as a given that the power to change the membership composition of an organization is also the power to change the way in which that organization collectively speaks, prays, assembles or petitions government. The exercise of these express freedoms is by people, and the differences in people and their perspectives are often products of their differences in sex, race, religion and ethnicity.

This court has acknowledged that the right of association and its necessary corollary—the right of non-association—is in itself a fundamental liberty. In *Shelton v. Tucker*, 364 U.S. 479, 486 (1960), the Court characterized the right of free association as a “right which, like free speech, lies at the foundation of a free society.” In *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), the right of association was referred to as “among our most precious freedoms.” In *NAACP v. Alabama*, 357 U.S. 449 at 460, Justice Harlan stated that it was “beyond debate that the freedom to engage in association is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech.” In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-580 (1980), the Court declared that a body of fundamental rights, including freedom of association, are shared “in common with explicit guarantees.” (*Id.* at 580.) The fundamental nature of the unfettered right to associate

was recognized by this court to produce the "diversity of opinion that oils the machinery of democratic government" in *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974).

The lead and concurring opinions in *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678, acknowledge that the right of association and the other non-enumerated fundamental liberties exist on a par with the expressly guaranteed rights and are neither denigrated nor subordinated by the fact that they are not specified in the written Constitution itself. The Court acknowledged that these fundamental rights spring from a more basic body of principles grounded in human freedom and their existence is evidenced, not diminished, by the express provisions of the Bill of Rights. The Ninth Amendment alone is direct evidence of that principle. The State's argument that one of these non-enumerated fundamental liberties—association—is not protected in the absence of a proven direct invasion of one of the express guarantees—speech, assembly, etc.—is untenable.

The unexpressed fundamental liberties are protected for their own sake. The point is illustrated by *Pierce v. Society of Sisters*, 268 U.S. 510 (1924) and *Meyer v. Nebraska*, 262 U.S. 390 (1922), among other cases, in which the right to educate one's children as one chooses and the right to study the German language in a private school were afforded Constitutional protection for their own sake even though the exercise of neither right had anything to do with speech, assembly, prayer, or petition.

Similarly, *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1972) rested upon the non-enumerated right to privacy even though a woman's decision to terminate pregnancy is not even arguably the exercise of any of the express freedoms.

It is submitted that this Court has consistently viewed the Constitution as a document which simply exposes a more fundamental body of liberties. See Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961). The State's view of the Constitution and the Bill of Rights as a freedom-limiting document permitting governmental intrusion short of clear proof of direct infringement of the express guarantees is in error.

c. Rights of Association and Rights of Expression and Assembly are Inseparable in Concept and in Practice.

This case does not present the extreme example of the exercise of a fundamental liberty having no overt connection to the exercise of an express guaranty. Nor did the Court of Appeals find it necessary to fully explore the theoretical nature of the right of association. As a general matter the nexus between the right of association and the rights of speech and assembly is inherent in the nature of those rights. The power of the state to change the membership of an organization is inevitably the power to change the way in which it speaks. In this specific case, the right of the Jaycees to decide its own membership is inseparable from its ability to freely express itself.

The act of association itself is a "form of expression of opinion," *Griswold v. Connecticut*, 381 U.S. at 483. The Jaycees' stated core purpose—to advance the interests of young men alone—springs from a belief that young men need or deserve such an organization. That belief finds meaning only upon its expression in the formation of an association confined to young men. Just as the State cannot act as a judge of the validity or importance of any belief, it cannot do so indirectly by thwarting the only effective and otherwise law-

ful expression of that belief. The State presumably would not claim the right to force N.O.W. or NAACP to abandon their core purpose and belief by concerning themselves with the separate concerns of men or white persons, and if N.O.W. and NAACP chose to confine their membership to women or Blacks to enhance the internal loyalty to their cause, the State likewise could not interfere with that selective process.²

The expressive aspects of the Jaycees, however, are not confined to the act of organizing in itself. The Jaycees is a major organized voice of young men in the United States, just as N.O.W. serves as an effective voice on behalf of women. This is not to say that the Jaycees is as intense an advocacy organization as N.O.W. or NAACP. The Jaycees does more than advocate positions on public issues but it unquestionably does that much, and when it does, it speaks from a segment of society that has its own special concerns. For example, no group is as impacted by military conscription as young men between 18 and 35. The organized voice of young men on the draft is unquestionably of a different nature than the expression of women or older men and that voice has the right to be effectively expressed from a platform confined to young men.

It is true that most of the public stances taken by the Jaycees in the past have had no overt gender content, i.e. men and women, would arguably be unlikely to divide along gender lines in addressing many of those questions. But even such apparently non-gender related issues as President Reagan's economic policies (supported by the Jaycees) has recently found

² In principle, there is no distinction between an organization, such as N.O.W., whose externally directed activities are confined to one sex, one racial or ethnic group or one religious group and an organization, such as the Jaycees, which expresses its desire to aid one of these groups by limiting its membership accordingly.

measurably less acceptance among women than among men—known as the “gender gap”—explainable only by sex-related differences in perspective. Current sociological trends, and the emergence of powerful women’s organizations, have acted to encourage women to view public issues from the special perspective of their sex, and it is to be expected that men and women will diverge even on issues that have no gender content on their surface.

There are at least three explosive issues extant today which are blatantly gender related: ERA, abortion, and the very issue in this case. These issues do not necessarily divide all men from all women, but men and women are compelled by their very gender to view the issues from radically different perspectives.³

The Jaycees have not yet spoken on ERA or abortion, yet its decision to remain silent and avoid these divisive issues may well be impacted by the presence of women voting members. The basic issue in this case has been litigated by the Jaycees in numerous courts over the past decade at considerable expense; the presence of women voting members and officers would clearly have hindered the Jaycees’ ability to devote its resources to this constitutionally protected advocacy.⁴

According to the State the test ought to be whether an association has in the past—or will in the future—take public positions on issues which would be different if an unwanted

³ Consider the political impact if the Jaycees as a purely young men’s association, supported ERA. As a mixed young adult association, its support of ERA would probably be of only passing interest.

⁴ Substantial numbers of women joined the Jaycees’ Minneapolis and St. Paul Jaycees chapters during the effective period of the State’s injunction. Each chapter had women presidents. Those two chapters would have shouted down the use of Jaycees’ funds to finance this litigation.

class of persons defined by gender, race, religion, or ethnicity, were forced in by use of the State's police power. Failing such proof, it is said, the State's police power must prevail. A variation of this argument is found in one of the dissents below wherein it is observed that the Jaycees is not primarily an advocacy organization, 709 F.2d at 1583 (A-132). These views suggest that the fundamental liberty to select one's own organizational companions for the purpose of enhancing their ability to achieve lawful purposes, including effective expressions on important public issues, is to be left to a case-by-case analysis in which the courts will be required to determine such subtleties as the impact of new members on the existing group in the future and to draw impossibly fine distinctions between advocacy groups and those whose advocacy is only a part of their activity. If anything would be left to the fundamental nature of the right of association, it would be quickly destroyed in the continued and expensive warfare invited by these approaches.

In summary, the right of the Jaycees to select its own membership as it sees fit is well within the protection of the Constitution both as a right in itself and because the failure to protect that right unavoidably infringes the Jaycees' freedom of expression and assembly. The right of free association is no more subject to invasion by the State than the exercise of the express guarantees.

d. The Jaycees Associate Member Status.

There are 11,915 nonvoting Associate Members in the Jaycees (Pl. Exh. 21, Tr. II 45), a number which includes older men, women, and organizations who do not qualify for full individual or chapter membership. This is a tiny fraction of

the regular membership of 295,000.⁵ Insofar as this status is claimed to be discriminatory as to women *within* the organization (see ACLU amicus brief), the status is purely voluntary and no woman need join at all if she is offended.

For the purposes of this case, the existence of the Associate Member category is irrelevant.⁶ Some have argued that the fact that the availability of that limited status to women somehow diminishes the Jaycees' claim to associational rights. If this were so, the Jaycees will simply bar women altogether,⁷ and the fundamental issue will remain unresolved.

The Jaycees' basic argument is that it has the right to decide for itself whether women shall be members in any status without interference by the State. If the Jaycees choose to permit women a limited status, this is its choice, but by making that choice, it would be absurd to suggest that the Jaycees are compelled to open the doors all the way. More importantly, voting and holding office are the means by which the qualified male members determine the programs and public positions of the Jaycees. The Associate Member category denies to women and older men any decision-making influence within the Jaycees, and it is precisely that influence which the Jaycees claim it has the right to share or not share as it sees fit without state interference.

⁵ It is not possible to determine from Jaycee records the number of women Associate Members. There were 311 in Minnesota in 1981 (Pl. Exh. 21).

⁶ Insofar as the State's case rests on the opportunity to make valuable personal contacts in the Jaycees, that opportunity is fully available to women in an Associate Member status. The Jaycees does *not*, however, rest its case on that fact; the existence of the Associate Member category neither supports nor detracts from the Jaycees' argument.

⁷ The Associate Member category was originally conceived to permit other organizations to have a relationship with the Jaycees. The fact that individual women literally fall within its definition is a happenstance. The Bylaw can be, and would be, promptly amended if necessary.

e. The Right of Association is not Limited to Organizations with Selective Membership Policies.

The opposing briefs either expressly or by implication argue that the Jaycees do not enjoy the constitutional right of association because its membership is not selective. Some of the amici even argue that freedom of association is limited to private clubs. This limited view of the right of association finds no support, however, in the decisions of this Court. The right of association (and the necessary correlative right of non-association) has never been limited to organizations with "selective" membership policies. The Jaycees' limitation of full membership to men between the ages of 18 and 35 is far more selective than the membership requirements of the NAACP and the Students for Democratic Society which have received freedom of association protection in *NAACP v. Alabama*, supra, and *Healy v. James*, 408 U.S. 169 (1972). The NAACP admits men and women of all religious creeds and races who agree with the purpose of the organization (Pl. Exh. 25, p. 9771). Likewise, the Democratic Party which was the beneficiary of this Court's right of association decision in *Cousins v. Wigoda*, 419 U.S. 477 (1975), is an organization with an unselective membership. Indeed, the Kiwanis, which is hardly more selective than the Jaycees, has been exempted by Minnesota from the reach of its statute.

A substantial number of all male and all female organizations limit membership only by the fact that the person must be a man or woman of good moral character, and yet few would question that these organizations have the right of association (see Jaycees' Exhs. A, B, C, D, E, F, and G, Tr. I 66; Pl. Exhs. 24 and 25, Tr. II 55).

f. The Court's Decisions in *Norwood* and *Runyon* are Inapposite.

The State relies on *Norwood v. Harrison*, 413 U.S. 455 (1973) and *Runyon v. McCrary*, 427 U.S. 160 (1976). Both decisions are inapplicable. In *Norwood*, the court was faced with the constitutionality of the State of Mississippi's action in loaning state-owned textbooks to children attending racially segregated private schools. This Court held that such state action was unconstitutional. *Norwood*, therefore, involved state action, not private action as was made clear in *Gilmore v. City of Montgomery*, 417 U.S. at 575. In *Junior Chamber of Commerce of K.C., Mo. v. Missouri St. J. C. of C.*, 508 F.2d 1031 (8th Cir. 1976), the court flatly rejected the same (i.e. "official action") argument as applied to the Jaycees holding that nothing in the Constitution prevented the Jaycees, a private association, from choosing its membership as it saw fit.

Runyon involved only the application of 42 U.S.C. § 1981 to the refusal of a private school to admit Black children solely because of their race. The decision is narrowly drawn so as to achieve the special purpose of § 1981 which was, in turn, based on Section 2 of the Thirteenth Amendment giving Congress the power to define and eliminate "badges of slavery," 427 U.S. at 170. This Court made it clear that the case did not involve the right of a private social organization to limit its membership on racial or any other grounds or the right of a private school to engage in sex or religious discrimination in its admissions policy "since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity." 427 U.S. at 167.

The narrow grounds upon which *Norwood* and *Runyon* were decided render them of no value in this case.

II. THE STATE HAS FAILED TO DEMONSTRATE A COMPELLING GOVERNMENTAL INTEREST.

In *Buckley v. Valeo*, 424 U.S. 1 (1976) at 25, this Court reiterated the standard of judicial review to be applied to cases challenging "state action" infringing upon basic constitutional rights:

The Court's decisions involving associational freedoms establish that *the right of association is a "basic constitutional freedom,"* . . . , that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." . . . In view of the *fundamental nature of the right to associate*, governmental "action which may have the effect of curtailing the freedom to associate is subject to the *closest scrutiny.*"

(Emphasis supplied.)

In *Elrod v. Burns*, 427 U.S. 347 (1976) at 362-363, this Court again set forth the standard of review which must be applied in this case:

It is firmly established that a significant impairment of First Amendment rights must survive *exacting scrutiny*. —"This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct." . . . *Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest."* The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. . . .

Thus the burden falls squarely on the State of Minnesota to justify its encroachment on the Jaycees' freedom of association by advancing and showing an interest which is of paramount and of vital importance.

In addition, the State's action must be "closely fitted" to the furtherance of the alleged compelling governmental interests. *Larson v. Valente*, 456 U.S. 228 (1982).^{*}

The State makes no effort to demonstrate anything more than a desire to prevent the Jaycees from excluding women; no "compelling" interest is claimed as to membership organizations generally. The State argues sophistically that it has a compelling interest in prohibiting sex discrimination in "public accommodations." This argument begs the question and substitutes the use of labels for reasoned analysis. The issue before the Court is not whether the State has demonstrated a vital interest in preventing discrimination within the general category of "public accommodations." The issue is far more precise, i.e., whether the State has demonstrated a compelling interest in prohibiting the Jaycees from confining its Individual Memberships to young men. The State cannot by virtue of affixing the label "public accommodation" to the Jaycees, avoid the "strict scrutiny" which the Constitution requires or predetermine the constitutional issues. "A state cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

If the law were otherwise, the State of Minnesota could affix the label "public accommodation" to any of the hundreds of membership organizations in Minnesota and, by such a devise, compress them into the same mold as restaurants and

^{*} This case does not present the narrow "time, place, and manner restriction" upheld in *Heffron v. Int'l. Soc. For Krishna Consc., Inc.*, 452 U.S. 640 (1981).

hotels as to which the applicability of public accommodation laws is unquestioned. The State could, for example, affix the label "public accommodation" to the Girl Scouts and require that organization to admit boys. It could also affix the "public accommodation" label to the Sweet Adelines and the PEO Sisterhood and require those organizations to admit men. The examples are legion and would include all male civic organizations such as Rotary, Optimists, and Lions; such religiously affiliated organizations as the Knights of Columbus; and ethnic organizations such as The Sons of Norway.

If the State is to dictate the composition of private membership organizations, it must prove a great deal more than it has. Its burden is particularly heavy because of the proliferation not only of gender-limited groups but also groups defined by national origin, religious affiliation and race. These private groupings are healthy manifestations of a culturally rich pluralistic society; the State has yet to justify its potential threat to this unique American asset.

The question of the admission of women to theaters, restaurants and hotels is radically different and involves none of the private associational characteristics which are inherent in the question of who shall and shall not be granted membership in a voluntary membership organization. The sale of a plate of food is an ordinary commercial transaction having no significant associational consequences; public accommodation laws do not require a restaurant owner to have dinner with his customer or share in the ownership and direction of the restaurant's affairs. The women seeking membership, with the coercive aid of the State, are seeking no less than a share of the ownership and policy making functions of the Jaycees—a significantly different matter than the purchase of goods or services in commerce. The State, if it is to justify its actions

in dictating the membership policy of the Jaycees and other similar organizations, must advance and demonstrate the existence of an interest which is "compelling" (*Elrod v. Burns, supra*, at 362) and of an entirely different nature than that applicable to restaurants, hotels and the like. The State has not done so in this case.

The State argues that requiring full memberships for women would not compel the Jaycees to abandon its purpose of providing leadership training, self improvement and community involvement to young men. This argument, however, overlooks the fact that by dictating full membership for women, the State has thwarted the Jaycees' fundamental and express purpose to serve only young men.

It is arguable that the male members of the Jaycees might benefit in some respects from the forced inclusion of women as full members. But this is no justification for the State's action, nor is it the business of government to make such determinations. Stated in its starkest terms, the right the Jaycees seek to vindicate is the right to decide for themselves whether the admission of women will be beneficial or not. Their decision may be wrong, offensive, or lacking in logic, but no government or its courts has the right to substitute its judgment for that of the members of the Jaycees absent demonstration by the State of a "compelling interest" for doing so.

The exercise of any First Amendment right, such as the right of freedom of speech, for example, may be actually destructive of the immediate best interests of the person exercising that right. But the Constitution does not grant government the power to prevent the exercise of that right even if misguided.

Finally, it should be noted that the Minnesota Supreme Court, in attempting to limit the application of its public ac-

commodation law to only so-called "public" membership organizations, declared that organizations "such as" the Kiwanis may freely exclude women. The Minnesota court stated:

We therefore reject the national organization's suggestion that it be viewed analogously to private organizations such as the Kiwanis International organization.

(A-83.)

This statement, which is an integral part of the Minnesota Court's interpretation of the statute, makes a mockery of any claim by the State of a "compelling" state interest. The Kiwanis is approximately the same size as the Jaycees (about 300,000 and has solicited new members with no less success than the Jaycees. The Kiwanis, if anything, is less selective than the Jaycees, for it extends membership to *all* men, not just those between 18 and 35. The two organizations are, for these purposes, legally indistinguishable and they both exclude women.

If the desire of the older men of the Kiwanis to remain an all-male organization is not thought by Minnesota to pose any threat to the common good, it can hardly be argued that the identical policy of the younger men of the Jaycees menaces the peace of that state or justifies the use of its police power.

In addition, the wholesale exclusion of indistinguishable organizations "such as" the Kiwanis from the penal impact of the state statute hardly bespeaks a statute which is "closely fitted" to the furtherance of the State's alleged compelling interest. *Larson v. Valente, supra*. The exclusion of the Kiwanis, rather, betrays a haphazard and discriminatory approach to law enforcement.

A common theme advanced in opposing briefs is the notion that the Jaycees represent power and influence and that voting

membership in the Jaycees is essential if a woman is to succeed in business and professional life.⁹ No evidence of record remotely suggests that the Jaycees occupy this alleged exalted status in the power structure of American society, nor did the State's evidentiary efforts even aim in this direction. The State proved only that a few women members of the Minneapolis and St. Paul Jaycees considered their experience enjoyable and helpful to them in pursuing their regular occupations. There is no evidence from which to conclude that Jaycee membership is the *sine qua non* of employment, promotion or ability to make potentially useful business contacts by men or women.

Beyond the confines of the record, moreover, common experience refutes this pervasive myth. Whatever influence and power a man or woman may have is not vested in them by membership in a volunteer membership association of the type involved here. They obtain that influence, if at all, in their regular occupations. The only influence such an organization has is over its own organizational affairs and, even within the same association the relative impact of its various local chapters varies dramatically from community to community—some chapters being moribund, others being very active. A formal organizational structure does provide a better platform for the expression of ideas common to that group but the First Amendment dictates that this collective speech influence mitigate against State invasion of their right to associate as they please, rather than suggesting an enhancement of State power.

The ability of women to make valuable personal contacts with other men and women either individually or in some

⁹ The rhetorical expression "old boy's network" is commonly used in this connection. Whatever else may be said about the accuracy of that expression, it is difficult to conceive of the Jaycees, composed of men under 36, as part of an "old boys network."

formal association context is virtually unlimited. The ability of young women to learn the techniques of organizational leadership outside of their regular employment hours likewise has few bounds. In Minneapolis and St. Paul these opportunities exist in settings ranging from local churches, non-gender restricted civically oriented groups, and political parties, to a variety of influential all-female organizations. The suggestion that the Jaycees in Minneapolis, for example, is particularly influential would come as a surprise to any knowledgeable Minneapolitan. The all-female Minneapolis Junior League, confined to women under 40, has been a potent force in the community for decades, far surpassing the Jaycees in this connection. The notion that women do not have influence either locally or nationally and that this influence is denied them by the existence of all-male associations is simply untrue. The female dominated opposing amicus N.O.W. is a supreme example having recently lent its considerable influence to a very grateful major presidential candidate.

Undoubtedly, men have formed commercially valuable relationships as a result of their membership in restricted private mens clubs¹⁰ and the larger mens organizations such as Kiwanis, Rotary, Jaycees, etc., but it is a distortion to suggest that men spend their regular business hours waiting to attend the Jaycees and Lions meetings where the "real" decisions are made. If men have a tendency to gather privately as men, outside of working hours, and discuss matters of importance to them, so be it. But if they wish to do so without the presence of women, the public golf courses, the duck blinds, the monthly

¹⁰ It seems to be uniformly conceded that the classic private mens club clearly has the right to remain all-male. Yet the pervasive rhetoric insists that it is precisely those private clubs where the "real power" lies.

poker games, or, for that matter, the exempted Kiwanis, can and do provide ample opportunity.

The United States Jaycees is justifiably proud of itself and the benefits that it provides to its members. Reality suggests, on the other hand, that those benefits vary among the various local chapters, depending on the quality of local leadership and the characteristics of their communities. The national organization can only persuade and provide the raw materials for the success of a local chapter. The same can be said for every private association. Much of the State's case rests upon the existence of these benefits and the claim that women are deprived of them. Yet the State's injunction would fall as heavily upon a poorly organized Jaycee local chapter which did nothing more than have an occasional beer party as it would upon a well led chapter which had taken advantage of all of the opportunities provided by the national organization. Moreover, the State's argument implicitly reserves the State to unilateral power to decide when an organization provides enough benefits of the right kind to be of value to the excluded group; once this magic line is reached, the State assumes the power to force the excluded group in regardless of the wishes of its members. This, in turn, would have the right of association, free of State interference, depend on the degree of success attained by each association to be measured by impossibly arbitrary standards.

Even if the Jaycees' chapters were uniformly active and successful, nothing would be left of the right of free association under the State's proposal. "Association" has no meaning except as a mutual decision to association. "Freedom of association" necessarily involves the unilateral right of either party to reject the proffered association.

The State has not met its burden of demonstrating a compelling State interest or that its actions have been closely fitted to the achievement of any such interest.

III. VAGUENESS AND OVERBREADTH.

Preface.

In their purest form, issues of vagueness and overbreadth assume the existence of the basic power of state to reach the subject matter involved; each of those doctrines addresses itself only to the manner in which the state has exercised its power. In this case the Jaycees does not concede the State has any power to dictate its membership composition. These issues are argued in part because they have clearly emerged. They are also argued in part because they illustrate the broader Constitutional morass into which a state descends, almost inevitably, when it assumes to itself the basic power to interfere with an association's choice of its own members. If a state seeks to avoid vagueness, it could do so by outlawing all discriminatory membership policies in all bona fide private associations, but would promptly encounter overbreadth problems. To avoid overbreadth, a state must inevitably risk vagueness problems. Minnesota was unable to avoid any of these defects.

We know of no case which better presents the basic freedom of association issue. If the Court should rely solely on vagueness or overbreadth, the basic issue will remain unresolved although it will inevitably reach this Court in some other case.

The outpouring of amici in this case illustrates the need to firmly resolve the basic issue, adding such holdings on these subsidiary questions as the Court deems fit.

a. The Minnesota Statute is Unconstitutionally Vague.

The Minnesota Human Rights Act imposes criminal and civil punitive sanctions including the penal consequences inherent with injunctions. Minn. Stat. §§ 363.071(2), 363.091 and 363.101.

The doctrine of vagueness addresses itself to three considerations, to-wit: (1) are persons of ordinary intelligence provided fair warning of the penal consequences of their behavior; (2) do those charged with enforcement have sufficiently explicatory standards imposed upon them to avoid arbitrary and discriminatory enforcement; and (3) in the case of basic First Amendment freedoms, does the statute serve by its vagueness to inhibit their exercise. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The requirement of non-vagueness applies to statutes defining the class of persons subject to the law to the same extent as it does to statutes defining the prohibited conduct. *United States v. Cardiff*, 344 U.S. 174, 176 (1952); *Winters v. New York*, 333 U.S. 507, 515-516 (1948).

For purposes of vagueness analysis the Minnesota Supreme Court decision must be taken as the words of the statute and every expression contained as the equivalent of a legislative enactment. *Winters v. New York*, *supra*.

The Court of Appeals held the Minnesota statute void as vague primarily because of the Minnesota Court's reference to the Kiwanis International as a "private"—and therefore exempt—association within its public-private dichotomy. The Minnesota Court said, in articulating its interpretation of the statute:

We therefore reject the national organizations [Jaycees'] suggestion that it be viewed analogously to private organizations such as the Kiwanis International organization. 305 N.W.2d at 771. (A-83)

Applying the general tests alluded to by that court, the Kiwanis is approximately the same size as the Jaycees—about 300,000 members nationally with 7750 local chapters¹¹—and has recruited its members with equal success. If anything, the Kiwanis is less selective than the Jaycees for it holds out membership to all adult males, not just those 35 or under.

Kiwanis and Jaycees are indistinguishable for these purposes and the State has never claimed any distinction justifying this disparate treatment. Rather the State has lamely suggested that its court's reference to Kiwanis was off-hand and meaningless, or was merely a rhetorical device used to respond to a Jaycees argument before that court. The Minnesota Court's decision is, however, the equivalent of the statute and every expression therein must be taken as Minnesota's authoritative pronouncement of the intent of its legislature. *Winters v. New York*, supra. All membership organizations are compelled to view that decision as the statute and all are faced with the impossible task of determining whether they are more like the Jaycees or the Kiwanis.

Having labeled the Kiwanis as "private" and exempt, the Minnesota Court left the statute in a quagmire of vagueness. The Jaycees have no idea why the Kiwanis may lawfully exclude women while the Jaycees are subject to criminal and civil penal sanctions for precisely the same act. A myriad of

¹¹ Gales, *Encyclopedia of Associations*, p. 748 (Pl. Exh. 25). The Jaycees has 295,000 members with 7400 local chapters, as of August 1981. (Pl. Exh. 21, Tr. II, p. 56).

gender-restricted organizations are left to guess whether they are "public" like the Jaycees or "private" like the Kiwanis without any ascertainable standards.

The dissent in the Court of Appeals gratuitously offers a distinction based on a Kiwanis bylaw which provides that chapter membership shall consist of men in "business, vocation, agriculture, institutional or professional life" but no more than 20% in each category. (See Kiwanis rule stated in full at A-39.)

The dissent states:

Such a restriction circumscribes membership boundaries and would serve *in itself* to make the Kiwanis "private," unlike the Jaycees which has no limiting requirements except for age and sex.

(Emphasis added) (A-48).

There are two fatal defects in the dissent's view. First, neither the Minnesota court nor its attorney general has ever stated what it is that made the Kiwanis "private." There is no assurance that if the Jaycees adopted a similar rule the Minnesota Court would consider that sufficient in itself to convert the Jaycees to a "private" association and thereby continue to lawfully exclude women. Moreover, the Minnesota court's generalized criteria of size, recruiting technique and selectivity were used, as to the Jaycees, in some unspecified admixture of which the ingredient proportions were not stated. The 20% rule, according to the dissent, relates only to selectivity and it is impossible to believe that this single cosmetic change¹² by

¹² As a practical matter, the 20% rule cannot be enforced literally. A big city chapter could not expect to receive 20% of its members from agriculture and would necessarily have a greater percentage in one or more of the other categories. At best, this "rule" is only a statement of general policy.

the Jaycees would tilt the balance in its favor, particularly in light of the intensity of the Minnesota Court's determination to outlaw the Jaycees' all-male policy. It is, after all, the Minnesota Court which is responsible for applying and interpreting its own statute, not the Federal judges, and it would be perilous for the Jaycees to rely on this thin reed. The Jaycees cannot safely assume that any single structural change will suffice.

Secondly, the Kiwanis 20% rule is *not* a limitation on Kiwanis membership; the dissent below misread the rule. Those five occupational categories, one of which is "vocation," embrace every known occupation. Contrary to the dissent's view, the rule is an effort to *avoid* a type of selectivity by hopefully ensuring that no one occupational group will dominate a Kiwanis chapter. Significantly, it is precisely this type of de facto selectivity that has in fact characterized the Minneapolis and St. Paul Jaycee chapters, both of which are dominated by persons from business and corporate management (Tr. I, 148, 183-184). Those two chapters are distinctly unrepresentative of the otherwise eligible 18-35 male group in the Twin Cities. Clearly, some informal selective criteria has been used by those chapters.¹²

It would be simple enough for the Jaycees to adopt a similar 20% rule, which would serve only as a statement of policy encouraging chapters to be more representative of the larger eligible population group. But the thrust of the rule would be clearly towards increased nonselectivity and would hardly be a safe route to the exempt "private" status created by the Minnesota court.

¹² Significantly, the St. Paul Jaycee chapter recently withdrew from any Jaycee affiliation and now calls itself "Community Business Leaders." It has filed an amicus brief. The narrow selectivity of that group has now become overt.

The dissent also argues that the Jaycees lack standing to challenge the statute for vagueness as to other "hypothetical" organizations not before the court. 709 F.2d at 1582 (A-66). This view misconstrues the Jaycees challenge. The Minnesota Court did *not* hold that sex discrimination in membership associations was illegal in itself. Rather it held that it became illegal only when enforced by a "public" membership organization. The question of whether the Jaycees was "public" or "private" revolved around factors of size, recruiting techniques and selectivity, all unrelated to the Jaycees' all-male policy itself. In other words, the test according to Minnesota has to do with certain organizational structural characteristics other than the particular form of exclusionary policy.¹⁴ The Jaycees is free today in Minnesota to change its organizational characteristics in some unknown fashion so as to become "private" like the Kiwanis and continue to exclude women. The problem, therefore, continues to face the Jaycees—what do the Jaycees do to become like the Kiwanis? The Jaycees face a more perilous predicament because of the existence of the State's injunction (currently rendered ineffective by the district court's injunction mandated by the Court of Appeals). If the Jaycees guess wrong in solving the Sphinx riddle posed by the Minnesota Court, the consequences would be dire. The vagueness issue cannot be so easily avoided by spurious standing arguments.

Vagueness analysis is simplified by the Minnesota Court's inexplicable reference to the Kiwanis as "private." Even without that reference, however, the problem is acute. The Minnesota court uncritically borrowed its general criteria for determining the "public" or "private" nature of a bona fide

¹⁴ The Jaycees was not labeled "public" because it excluded women. If that had been the test not even the Kiwanis would have survived.

membership association from a very different body of law involving the "private club" issue arising under the Civil Rights Act of 1964, 42 U.S.C. § 2000a(e).¹⁵ Those cases concerned racial discrimination and the essential question was whether the claimed "private club" status was a sham to avoid the Act. The Minnesota statute contains no "private club" exception and that question was not before the court.¹⁶ Nor was the Jaycees either accused or found to be engaged in a sham or subterfuge; the Jaycees is conceded to be a bona fide membership association.

Vagueness is not a serious issue when an otherwise public restaurant seeks to maintain its all-white customer restriction by artificial attempts to call itself a private club—nor does such a case threaten legitimate efforts to exercise the constitutional right of association. But when the same generalized criteria are used unanalytically in the context of bona fide private associations, the matter becomes critical. Consider the practical dilemma facing the Jaycees and its attorneys if the Court of Appeals is reversed. What structural changes can be safely made in the Jaycees so as to become "private" and continue to remain all-male, without destroying its otherwise lawful purpose? Does the Jaycees limit its size and, if so, what

¹⁵ *Nesmith v. YMCA*, 397 F.2d 96 (4 Cir. 1968); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (Conn. 1974); *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex 1970). *Nesmith* also involved a physical facility, part of which was concededly open to the public. Of those three cases, only *Cornelius* involved significant private associational issues and the court ruled in favor of the Elks.

¹⁶ The Minnesota court was deciding whether the Jaycees was a public or private "association or organization," 305 N.W.2d at 771 (A-83), a substantially broader concept than "private club." This is made clear by the fact that it exempted the Kiwanis as "private" although the Kiwanis is no more or less a private club than is the Jaycees.

size will qualify? Does it reprint its recruiting literature to avoid the exuberant use of marketing lingo? What types of "selectivity" does it adopt without destroying itself? If the age limitation is not enough, does it bar non-high school graduates, blue collar workers, government employees? No standards have been provided by the Minnesota court and, by labelling the Kiwanis as "private," it destroyed any semblance of standards.

The State's Attorney General states in his brief (App. Br. 29) that:

the standard which emerges from the [Minnesota court] opinion is that an organization which sells goods and privileges in exchange for membership fees, which solicits and recruits its members on an unselective basis from the public at large and which does so at various sites within Minnesota is a "public accommodation."

This "standard" applies with full force to the multi-million member Boy Scouts (3,200,000, Pl. Exh. 25, p. 683) and Girl Scouts (2,400,000, Pl. Exh. 25, p. 710). This "standard" applies equally to the four million member National Council of Negro Women (Pl. Exh. 25, p. 979), the Junior League (130,000, Pl. Exh. 25, p. 747), the PEO Sisterhood (212,000, Pl. Exh. 25, p. 549), the Sons of Norway (105,000, Pl. Exh. 25, p. 1008), and the B'nai Brith (500,000, Pl. Exh. 25, p. 979), all of which are "discriminatory." Are they condemned like the Jaycees or sanctified like the Kiwanis? What changes do they make to preserve their historical character? Not even the State can tell them.

Arbitrary and discriminatory law enforcement has already been the rule in Minnesota and the Minnesota court's opinion openly invites further selective prosecutions. No investiga-

tions have been made of women's associations or others which exclude by reason of race, ethnicity or religious belief;¹⁷ political considerations have and will continue to be the determining factor. Prior to the Court of Appeals decision, the Kiwanis' Minneapolis convention in 1982 voted overwhelmingly to continue its all-male policy in the State's back yard, yet the State did nothing. The cause of even-handed justice in Minnesota has been mocked.

Vagueness is especially condemned when basic Constitutional liberties are at stake. The Minnesota statute fails to meet the enhanced standards of precision applicable in this context. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

Finally, the State proposes an astounding proposition in answer to the vagueness argument. It observes that "it is not clear that the Jaycees would be a public accommodation for the purpose of enforcing the provision of the Human Rights Act which makes it a misdemeanor to discriminate in that area on the basis of sex. Minn. Stat. § 363.101 (1982)." (Appellant's brief, p. 29, fn. 26.)

Since the Jaycees cannot be imprisoned and the maximum misdemeanor fine is only \$500, Minn. Stat. § 609.02, Subd. 3, a misdemeanor charge is substantially less penal than the civil enforcement provisions. The statute permits civil punitive damages up to \$6,000, Minn. Stat. § 363.071, Subd. 2, and the civil injunction process necessarily implies the power to

¹⁷ The Commissioner of Human Rights has the statutory power to initiate complaints on her own authority, Minn. Stat. § 363.06, Subd. 2, and the power to conduct general or specific investigations with the power of subpoena, § 363.05, Subd. 1(10). The Commissioner also has the power to promulgate interpretative rules to provide administrative guidelines to potentially affected associations. None of these powers have been used with respect to private association membership policies.

levy onerous fines for contempt. Vagueness, moreover, is as much a vice with civil penal statutes as in criminal statutes. See Annotation, *Vagueness-Noncriminal Statutes*, 40 L.Ed.2d 823.

If, to use the State's words, it is "not clear" that even the Jaycees would be a "place of public accommodation" in an innocuous criminal enforcement proceeding, how could the Jaycees in 1978, have conceivably guessed it would be facing the far more onerous penalties of civil enforcement? Since the choice of civil or criminal prosecution is solely the State's choice, the fate of a gender-restricted association in Minnesota apparently lies in which option the State chooses. Few better examples of arbitrary power created by a vague statute could be found.

b. The Minnesota Statute is Impermissibly Overbroad.

The Minnesota statute had no apparent overbreadth problems until the Minnesota court added its novel "gloss." See *Brown v. Hartlage*, 456 U.S. 45 (1982).

Overbreadth analysis in its purest form addresses itself to the impact of the statute upon the Constitutionally protected rights of those other than the persons before the Court. The doctrine acknowledges that the mere existence of a statute, with such "gloss" as the state courts have added to it, may constitute a chilling effect upon others, and for that reason the named litigant has standing to assert overbreadth even though the particular application in his case may not offend Constitutional principles. *Broaderick v. Oklahoma*, 413 U.S. 601 (1973); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Brown v. Hartlage*, *supra*. The impact upon others must necessarily include an assessment of the governmental interest involved, which must be compelling, and of whether the statutory

scheme is "closely-fitted" to the accomplishment of that objective. *Elrod v. Burns*, 427 U.S. 347, 362-363 (1976); *Larson v. Valente*, 456 U.S. 228 (1982).

Unlike other cases, the overbreadth issue arises here from a statute defining the class of entities forbidden to engage in that conduct, rather than a law defining the prohibited conduct itself. It is sophistry to suggest¹⁸ that an organization can avoid the whole problem by eliminating its exclusionary membership policy; the same Minnesota court has deliberately created a category of exempt "private" associations providing another option. In one respect, the overbreadth problem is more severe in this context. An otherwise overbroad law defining prohibited conduct or speech may well have a proper but narrower application grounded in a clearly recognizable and worthwhile public policy. See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972). In this case, the unexplained exemption of Kiwanis makes it impossible to detect what public policy is being advanced. The problem is intensified by the fact that, unlike *Gooding v. Wilson*, *supra*, the state's high court had its chance to authoritatively limit the statute but did so in a way which exempted only Kiwanis and otherwise provided no safely discernible limits to its reach.

The Minnesota Court's decision has a facially prohibitory impact upon the freedom of other existing and future organizations to select their members as they see fit. The effort of that court to restrict the sweep of its decision through its "public-private dichotomy" is only illusory. If that Court's generalized criteria of size, recruiting technique, and selectivity could be said to have any value in this connection, that value disappeared when the Court gave the Kiwanis as its example of an exempt "private" organization.

¹⁸ See, e.g., Minnesota court's statement, 305 N.W.2d at 771. (A-83)

The Kiwanis is the only organization which is presently immunized by name, leaving a myriad of organizations which confine their membership to persons of one "race, color, creed, religion, disability, national origin or sex"—the prohibited categories applicable to "places of public accommodation" as set forth in Minn. Stat. § 363.03, subd. 3. It must be emphasized that all of these prohibited categories of discrimination or exclusion are equally condemned once the statutory label of "place of public accommodation," § 363.01, subd. 18, is affixed.

Beyond the limited exclusions noted above, therefore, all private membership associations in Minnesota are impacted. The chilling impact is not confined to existing associations. Americans and Minnesotans have a pronounced tendency to continually form new associations in the private sector for a bewildering variety of reasons. Those in Minnesota who desire to form in the future a limited interest group confined to members of one gender, race, religion or creed are necessarily affected. If that association should aggressively seek new members, should become popular within their restricted groups and should otherwise be relatively nonselective, the problems would be acute. The Minnesota Court's decision is equivalent to a declaration to prospective new associations that they had best remain unsuccessful and small or they may be outlawed if they seek to enhance their voice by adding new members.

The Court of Appeals alludes to only one of the clear examples of a protected organization—a single issue political party devoted to the passage or defeat of the Equal Rights Amendment, 709 F.2d at 1560 (A-37-38). The Minnesota Court's decision could well condemn the all-male or all-female restriction in such a group and, by doing so, impact seriously upon the ability of that group to advocate its cause. The decision reaches even farther, however.

Associations Confined to Persons of One "Creed".

A particularly dangerous potential application of the statute as interpreted is to those organizations which restrict their membership to persons holding to a single "creed"¹⁹—a prohibited category of discrimination in places of public accommodation, see Minn. Stat. § 363.03, Subd. 3. The First Amendment, if nothing else, protects "creed" based associations from State imposed invasion by those of differing or hostile creeds or beliefs.

Women's Associations.

A statute which condemns all-male associations must necessarily condemn all-female associations to the same extent, for other constitutional reasons. We assume the State would quickly concede as much. Therein lies a paradox, unaddressed by the State.

Neither the State nor the amici have even suggested any "compelling state interest" for condemning the all-female association. Their claims rather are narrowly based attacks only on men's associations as representing an allegedly adverse element in society justifying the use of the state's police power. Overbreadth doctrines command that the innocent baby not be thrown out with the bathwater, yet a constitutional doctrine which permitted women to freely associate at will, while condemning precisely the same behavior by men, would be a nightmare.

¹⁹ "Creed" in this sense must mean something other than "religion," since "religion" is a separately stated prohibited category of exclusion.

Ethnic Associations.

The impact of the statute upon ethnic organizations is also apparent, assuming they cannot survive the "private" test. Ethnic groups reflect another rich American phenomenon—the desire to preserve some of the unique traditions of their country of origin. Probably no ethnic group is without some formal organization and some of these groups have been large, active and potent influences in their communities. (See Gales *Encyclopedia of Associations*, section 10, p. 989, Pl. Exh. 25) Of necessity they restrict membership—or "discriminate" in the State's terminology—to persons of one ethnic stock. Yet the Minnesota Court's opinion clearly threatens such an organization if it is of sufficient relative size, actively recruits among its fellow Norwegians or Swedes, and is otherwise "nonselective".

Private Associations Based on Religious Belief.

Private groups restricted to persons of one religious faith, such as B'nai Brith, Knights of Columbus and others,²⁰ cannot escape the threat. The B'nai Brith International is about 500,000 strong (Gales *Encyc.*, p. 1055, Pl. Exh. 25) and has an influence far beyond its numbers. It excludes or "discriminates against" non-Jews—both an ethnic and religious restriction. If the Jaycees is a "public accommodation" in Minnesota because it is relatively large within its relevant community, recruits intensively, and is otherwise nonselective, then so is the B'nai Brith or the Knights of Columbus which has over 1,300,-

²⁰ Including, significantly, the opposing Amici, the American Jewish Committee.

000 members, is confined to Catholic men (Gales, Pl. Exh. 25 at p. 993), and in some Minnesota communities may be very influential (e.g. St. Paul and St. Cloud).

Political expedience will undoubtedly dictate that Minnesota would not proceed against the Junior League, the Sons of Norway, or the B'nai Brith, but an overly-broad statute cannot be rendered valid because of political whims. Nor can the issue of overbreadth be avoided by a misguided faith in the case-by-case approach.

The Jaycees do not concede that any justification can be found in support of the State's action. The basic invalidity of Minnesota's actions merely becomes more apparent in the light of its indiscriminate impact upon other associations whose right to select their own members is clearly protected.

The Pandora's box opened by Minnesota is not confined to that state. For example, California's Unruh Civil Rights Act, Cal. Civ. Code §51, has been interpreted to apply to the Boy Scouts²¹, even though the Boy Scouts is not a "business establishment" (California's equivalent of "public accommodation") in the accepted sense so as to force the Boy Scouts to accept homosexuals as scout leaders. The California Supreme Court has described it as an Act which prohibits "any form of arbitrary discrimination". (emphasis added) *O'Connor v. Village Green Owner's Assn.*, 33 Cal. 3d 790, 662 P.2d 427 (1983). The far more limited statutory categories of prohibited discrimination are considered to be "illustrative rather than restrictive" *O'Connor*, 662 P.2d at 429. The tendency of some state courts to vastly extend the reach of their statutes into the realm of private associational decisions, without apparent limits, is

²¹ *Curran v. Mt. Diablo Council of Boy Scouts*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), pet. for hearing denied by California Supreme Court, Jan. 6, 1984, 4 Adv. Cal. 29. Juris. Stet. filed U.S. Sup. Ct. 3/14/84.

constitutionally alarming and needs to be halted now. Minnesota is only one example.

Overbreadth invalidity is strong medicine, *Gooding v. Wilson*, *supra*, but in this case the statute itself need not be invalidated. The Jaycees ask only that the statute be declared invalid only as it is applied to the choice of one's associates in a private membership organization, leaving the actual statute intact for its proper purposes.

CONCLUSION

Few cases in this Court's history have so deeply involved the shape and character of the private sector. Even Alexis de Toqueville would be astounded at modern Americans' phenomenal propensity to continually form private associations for a bewildering variety of purposes. Paradoxically, many of the amici associations opposing the Jaycees are themselves products of this manifestation of human freedom. This phenomenon is precisely what has created a culturally rich and pluralistic society, now under threat of an artificial egalitarianism which subordinates individual freedom to the dictates of the state.

The studied refusal of the State and the opposing amici to acknowledge the broad consequences of the power asserted by the State is alarming. Only the tenor of the times has made the Jaycees the favored target rather than a women's association or one restricted on the basis of race, religious belief or ethnicity.

The arguments of the Jaycees' opponents are uniquely uncritical exercises in rhetoric and descriptive terms designed only to justify predetermined conclusions. No one, however,

has been able to devise a means of reversing the Court of Appeals which would not destroy an American asset—the right of the people to decide for themselves who shall be their friends and associational companions.

The Court of Appeals should be affirmed in all respects.

March 22, 1984.

Respectfully submitted,

CARL D. HALL, JR.

Counsel of Record

6935 South Delaware Place

Tulsa, Oklahoma 74136

Telephone: (918) 492-6600

CLAY R. MOORE and

MACKALL, CROUNSE &

MOORE

1600 TCF Tower

Minneapolis, Minnesota 55402

Telephone: (612) 333-1341

Counsel for Appellee

Supreme Court U.S.
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No. 83-724

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

KATHRYN R. ROBERTS, Acting Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY, III, Attorney General
of the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner of the
State of Minnesota,
Appellants,
vs.
THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of
itself and its qualified members,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPELLANTS' REPLY BRIEF

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
RICHARD L. VARCO, JR.
Special Assistant
Attorney General
Counsel of Record
1100 Bremer Tower
Seventh Place and
Minnesota Street
St. Paul, MN 55101
Telephone: (612) 296-7862
Counsel for Appellants

Of Counsel:
THOMAS R. MUCK
Deputy Attorney General
RICHARD S. SLOWES
Assistant Attorney
General

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
I. The First Amendment Does Not Protect The Jaycees' Practice Of Restricting Its Membership Benefits On The Basis Of Sex	1
II. Equality Of Membership For Women Will Have No Effect On The Jaycees' Opportunity To En- gage In Free Speech	3
III. The Minnesota Supreme Court's Opinion In McClure v. United States Jaycees Does Not Render The Public Accommodation Provision In The Minnesota Human Rights Act Overbroad And Thus Unconstitutional	7
Conclusion	8

TABLE OF AUTHORITIES

	Page
Brandenburg v. Ohic, 395 U.S. 444 (1969)	6
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	7, 8
Buckley v. Valeo, 424 U.S. 1 (1976)	3
Garcia v. Texas State Bd. of Medical Examiners, 421 U.S. 995, <i>aff'g mem.</i> 384 F. Supp. 434 (W.D. Tex. 1974)	2
Griswold v. Connecticut, 381 U.S. 479 (1965)	5
Healy v. James, 408 U.S. 169 (1972)	6
NAACP v. Alabama, 357 U.S. 449 (1958)	5, 6
NAACP v. Button, 371 U.S. 415 (1963)	2
Runyon v. McCrary, 427 U.S. 160 (1976)	3
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)	7, 8

IN THE
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Minnesota Department of Human Rights;
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of the State of Minnesota; and
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Appellants,

VS.

THE UNITED STATES JAYCEES, a non-profit
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itself and its qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
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APPELLANTS' REPLY BRIEF

ARGUMENT

**I. THE FIRST AMENDMENT DOES NOT PROTECT THE
JAYCEES' PRACTICE OF RESTRICTING ITS MEMBER-
SHIP BENEFITS ON THE BASIS OF SEX.**

The Jaycees contends that its "core purpose" is to provide "beneficial service" to only young men and young men's organizations. Appellee's Brief at 11, 12. It then argues that the state's insistence that it also serve women interferes with

this purpose in an unconstitutional manner. *Id.* at 9. Underlying this contention is the mistaken assumption that the stated purpose itself is entitled to constitutional protection under the rubric of freedom of association. There is, however, nothing intrinsic in the objective of providing some benefit to young men or young men's organizations that calls for such protection. More to the point, that purpose is no more entitled to constitutional protection simply because it is the objective of a group rather than of an individual. This Court has never held, and should not now hold, that the concept of freedom of association constitutionalizes every goal that a group adopts. Freedom of association protects group advancement of beliefs and ideas. It does not constitutionally shield, as the Jaycees here insists, the practice of those ideas simply because it is engaged in by a group. Compare *NAACP v. Button*, 371 U.S. 415 (1963) (Associational freedom protects advocacy of ideas and redress of grievances, therefore group sponsorship of legal services to advance those ideas) with *Garcia v. Texas State Bd. of Medical Examiners*, 421 U.S. 995, *aff'g mem.* 384 F. Supp. 434 (W.D. Tex. 1974) (Although group advocated reducing cost of health care to low-income individuals, freedom of association does not guarantee a right to practice this belief by forming a health care corporation for this purpose which, contrary to Texas law, did not have a board of directors composed entirely of doctors). Thus, merely because the Jaycees may have identified a restricted group that it wishes to serve does not in and of itself justify a constitutional guarantee of non-interference.

The Jaycees argues further that its restrictive membership practice is entitled to constitutional protection because it is "the only effective expression of the underlying belief that young men, as a class, need or deserve such an organization."

Appellee's Brief at 11. That contention is based on yet another unjustifiably expanded perception of freedom of association. While the first amendment protects the Jaycees' right to believe in and advocate the need for men-only organizations, it does not guarantee the right to effectuate it. That was precisely the point made by the Court in *Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976). (First amendment allows advocacy of racial segregation, first amendment does not protect its practice.) Moreover, the Court gave no indication that this limitation on the scope to which the freedom of association can be stretched was restricted to cases involving racially-based discrimination.

II. EQUALITY OF MEMBERSHIP FOR WOMEN WILL HAVE NO EFFECT ON THE JAYCEES' OPPORTUNITY TO ENGAGE IN FREE SPEECH.

The Jaycees have not shown that granting women equal membership rights would interfere with any position which it might take on any civic issue. There is therefore not even a "reasonable probability" that its associational communication will be threatened or abridged by the equal participation of women. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). Despite the Jaycees' attempt to construct such evidence out of whole cloth regarding the issues of abortion, the ERA, and the draft, one's position on these issues is not determined by one's sex.

Moreover, although the Jaycees' by-laws restrict the ability of female members to obtain all of the benefits from its programs of individual, community, and chapter development, nothing in the Jaycees' Creed, the ideological basis of the organization, dictates or compels associational viewpoints

which would be determined by or affected by sex.¹ Women as well as men can and no doubt do adhere to each of these tenets. Indeed the same is true of a woman's ability to carry out the "core purpose" of the Jaycees. Appellee's Brief at 11. The organization's executive vice-president testified that women can aspire to the same goals set for male members in the Jaycees' by-laws. P. Exh. 1 at 1 (T. 10). Women can desire to devote time to community service in the public interest, can have a spirit of genuine Americanism and civic interest, and can desire to participate in the affairs of their community, state and nation. T. at 73-75. As such, female voting members and female officers would not disrupt the associational pronouncements of the Jaycees.²

The Jaycees' attempt to cast itself in the mold of organizations, such as the NAACP, which have been accorded protection from various types of state interference based on freedom of association is unavailing. It is simplistic to assert

¹ The Jaycees' Creed consists of the following beliefs:

That faith in God gives meaning and purpose to human life; that the brotherhood of man transcends the sovereignty of nations; that economic justice can best be won by free men through free enterprise; that government should be of laws rather than of men; that earth's greatest treasure lies in human personalities; and that service to humanity is the best work of life.

P. Exh. 1 at 1 (T. 10).

² In this respect, a favorable decision in this case would not have the purported disastrous effect on ethnic and religious organizations suggested by the Jaycees. Those groups are formed around or defined by ideas and experiences which if not adhered to or shared by one seeking admission to the group might interfere with the associational pronouncements of those organizations. A religious group, for example is composed of adherents to tenets which define what the group is. Those beliefs are central to the definition and composition of the group. The Jaycees' creed is neutral on the issue of sex-based distinctions of any kind.

that the NAACP received that protection merely because it was a group or because it seeks to advance the interests of blacks. Rather, the NAACP received protection because the activity in which it engaged to effectuate its purpose involved expression and petition for redress of grievances, activity specifically protected by the first amendment.

The inappropriateness of the comparison which the Jaycees makes between itself and advocacy groups is also evident upon examination of the purposes of the Jaycees and one such group, the NAACP, and upon review of the first amendment values protected by "associational freedom" ³ in *NAACP v. Alabama*, 357 U.S. 449 (1958). The Jaycees' purpose as it has evolved, is to provide leadership training to men using, among other educational techniques, participation in civic affairs. App. to Juris. Stat. at 57. On the other hand, the purpose of the NAACP includes promoting equality of rights and eradicating "caste or race prejudice among the citizens of the United States"; advancing "the interest of colored citizens", and securing "for them impartial suffrage", increased opportunity for acquiring "justice in the courts, education for their children, employment according to their ability and complete equality before the law." *NAACP v. Alabama*, 357 U.S. at 451. Adherence to these principles characterizes a member of the NAACP and distinguishes that person from the public. The Jaycees has no similar set of beliefs which underlie or require its exclusion of women. Indeed, even if the Jaycees' purpose is viewed as emanating from a belief in the need for men-only organizations, it is

³ Associational freedom also protects certain intimate associations. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Nonetheless the notions of privacy which underlie that protection, *id.* at 485-86, do not compel a similar result in this case. The Jaycees with its size and impersonal entrance requirements simply does not qualify for such consideration.

apparent that membership is not currently premised on belief in that ideology, as evidenced by the increase from 10% in 1975 to 33% in 1981 of the percentage of male Jaycees favoring some form of equal membership for women. App. to Juris. Stat. at 99, Appellee's Brief at 9.

What the Jaycees seeks to protect is not the opportunity to meaningfully express its views but rather the all-male aspect of its association. In contrast, what the NAACP sought to and did protect in *NAACP v. Alabama* was a state imposed restriction on its ability to communicate its views and hold its beliefs. Furthermore, if the state had sought to interfere with the content of the NAACP's advocacy, it would thereby have infringed upon the first amendment's guarantee of free speech. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). A similar result would have been reached if the state had sought to regulate the NAACP because of the content of its speech. *Healy v. James*, 408 U.S. 169 (1972). Freedom of association properly protects against these sorts of incursions into communal expression or advocacy. If the Jaycees is required to offer equal membership rights to its female members, none of the foregoing infringements upon free speech will occur. The state will not thereby regulate the content of the Jaycees' speech, will not impose content based regulations on the organization, and will not force it to give up or make more difficult its right to speak out on any issue. It is therefore erroneous for the organization to claim that equal membership benefits for women will abridge its right to free speech.

III. THE MINNESOTA SUPREME COURT'S OPINION IN McCLURE V. UNITED STATES JAYCEES DOES NOT RENDER THE PUBLIC ACCOMMODATION PROVI- SION IN THE HUMAN RIGHTS ACT OVERBROAD AND THUS UNCONSTITUTIONAL.

The Jaycees suggests that the Minnesota Supreme Court's construction of the public accommodations provision in the Human Rights Act is overly broad. Appellee's Brief at 43-49. In order to sustain this challenge, the Jaycees must show that the statute as construed "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). Moreover, "where conduct and not merely speech is involved . . . the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The Jaycees' overbreadth argument is supported only by the assumption that the statute would apply to numerous organizations which limit membership by, *inter alia*, sex, religion, or national origin. Appellee's at 46-47. Nothing in the record before this Court permits it to adequately determine whether the activities and membership practices of any of the referenced organizations are such as to cause them to be public accommodations like the Jaycees.

Religious and ethnic organizations, for example, may not offer goods or services to the public. Some organizations may not engage in the sale of goods and services. It is uninformed speculation to ignore such potentially important differences between the Jaycees and such groups and to claim as does the Jaycees that each would be covered by the supreme court's opinion.

Overbreadth challenges are permitted "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. at 612. In this case there is insufficient basis for the Court to make such a prediction or assumption. Because the Court cannot determine that the Minnesota Supreme Court opinion reaches a substantial amount of constitutionally protected conduct, the Jaycees' overbreadth challenge should fail. *Village of Hoffman Estates*, 455 U.S. at 494.

CONCLUSION

The judgment of the court of appeals should be reversed.
April 9, 1984

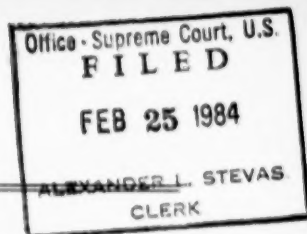
Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

RICHARD L. VARCO, JR.
Special Assistant
Attorney General

Of Counsel:
THOMAS R. MUCK
Deputy Attorney General
RICHARD S. SLOWES
Assistant Attorney
General

Counsel of Record
1100 Bremer Tower
Seventh Place and
Minnesota Street
St. Paul, Minnesota 55101
Telephone: (612) 296-7862



No. 83-724

**In the
Supreme Court of the United States**

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, COMMISSIONER,
MINNESOTA DEPARTMENT OF HUMAN RIGHTS;
HUBERT H. HUMPHREY III, ATTORNEY GENERAL
OF THE STATE OF MINNESOTA; AND
GEORGE A. BECK, HEARING EXAMINER
OF THE STATE OF MINNESOTA,
APPELLANTS,

v.

THE UNITED STATES JAYCEES, A NON-PROFIT MISSOURI
CORPORATION, ON BEHALF OF ITSELF AND ITS QUALIFIED MEMBERS,
APPELLEE.

On Appeal from the United States Court of Appeals
for the Eighth Circuit

**AMICUS BRIEF OF ALLIANCE FOR WOMEN
MEMBERSHIP IN SUPPORT OF APPELLANTS**

DANIELLE E. DEBENEDICTIS *
JAMES B. CONROY
NUTTER, MCCLENNEN & FISH
Federal Reserve Plaza
600 Atlantic Avenue
Boston, Massachusetts 02210
(617) 973-9700
Attorneys for Amicus Curiae

February 23, 1984

* Counsel of Record

TABLE OF CONTENTS

	Pages
Interest Of The Amicus Curiae.....	1
Summary of Argument.....	3
Argument:	
I. The Freedom Of Association Doctrine Affords The Jaycees No Right To Discriminate Against Persons With Whom It Has Chosen Freely To Associate.....	7
II. If Women Are Afforded Equal Treatment By The United States Jaycees, The Jaycees' Right To Express And Advance Its Ideas Will Not Be Impaired.....	17
Conclusion.....	30

TABLE OF AUTHORITIES

Cases:

<u>Alabama State Federation of Teachers v. James</u> , 656 F.2d 193 (5th Cir. 1981).....	28
<u>Buckley v. Valeo</u> , 424 U.S. 1 (1976).....	7
<u>Fletcher v. U.S. Jaycees</u> , 3 Mass. Discrimination Law Rep. 1036 (Mass. Commission Against Discrimination 1981) Nos. 78-BPA-0058-0071.....	13, 16

TABLE OF AUTHORITIES - Continued

	Pages
<u>Frontiero v. Richardson</u> , 411 U.S. 677 (1973).....	14, 15
<u>Gilmore v. City of Montgomery</u> , 417 U.S. 556 (1974).....	14
<u>Griswold v. Connecticut</u> , 381 U.S. 479 (1965).....	8
<u>Lucido v. Cravath, Swaine & Moore</u> , 425 F. Supp. 123 (S.D.N.Y. 1977)...	27
<u>Moose Lodge No. 107 v. Irvis</u> , 407 U.S. 163 (1972).....	12
<u>NAACP v. Alabama</u> , 357 U.S. 449 (1958).....	7
<u>National Organization for Women, Essex Chapter v. Little League Baseball, Inc.</u> , 318 A.2d 33 (N.J. Super. Ct. App. Div.), aff'd, 338 A.2d 198 (N.J. 1974).....	23
<u>Norwood v. Harrison</u> , 413 U.S. 455 (1973).....	13
<u>Runyon v. McCrary</u> , 427 U.S. 160 (1976).....	19, 28
<u>Shelton v. Tucker</u> , 364 U.S. 479 (1960).....	19

TABLE OF AUTHORITIES - Continued

	Pages
<u>United States v. International Longshoremen's Association</u> , 460 F.2d 497 (4th Cir.), <u>cert. denied</u> , 409 U.S. 1007 (1972).....	28
<u>United States Jaycees v. McClure</u> , 305 N.W.2d 764 (Minn. 1981).....	11
<u>United States Jaycees v. McClure</u> , 534 F. Supp. 766 (D. Minn. 1982), <u>rev'd</u> , 709 F.2d 1560 (8th Cir. 1983), <u>prob. juris. noted</u> , 52 U.S.L.W. 3509 (U.S. January 9, 1984) (No. 83-724).....	18
<u>United States Jaycees v. McClure</u> , 709 F.2d 1560 (8th Cir. 1983), <u>prob. juris. noted</u> , 52 U.S.L.W. 3509 (U.S. January 9, 1984) (No. 83-724).....	16, 21, 22, 25, 26, 27
Miscellaneous:	
<u>Appellee's Motion to Affirm, Gomez-Bethke v. United States Jaycees</u> , No. 83-724 (U.S. 1983).....	9, 24

INTEREST OF THE AMICUS CURIAE

The Alliance for Women Membership is a national organization comprised of individuals and entities who believe that membership in the Jaycees organization should be open to women on the same basis as it is open to men. In addition to male and female Jaycees who, as members of the Alliance, advocate full and equal membership for women, the Alliance is comprised of many former male and female members, present sponsors of Jaycees membership, and former sponsors who have ended their sponsorship because of the Jaycees' sexually discriminatory policy. Other equality-minded individuals and entities who support the principle of equal opportunity for women and men are also members of the Alliance. Because the organization is comprised of men as well

as women Jaycees who favor giving women full and equal Jaycee membership, its interest in this adjudication is particularly significant.

The Alliance was formed in 1978, in reaction to the United States Jaycees' pronouncement that local chapters which had women as full and equal members must reduce their women members to associate status¹ or face revocation of their Jaycees charters. An additional result of this newly announced Jaycees policy was the institution of lawsuits by women members of affected chapters.² The Alliance for Women Membership has been

1. Associate members do not have the right to vote or hold office or to receive awards.

2. The Minnesota case was one of these lawsuits.

active nationwide in supporting all of the women's rights litigation against the United States Jaycees.

The knowledge that the Alliance has of other lawsuits throughout the country involving the same and similar issues here presented, its knowledge of the internal functioning of the Jaycees organization and its familiarity with the role women already play in the Jaycees organization as associate members, brings a unique perspective and a noteworthy viewpoint to this Court.

SUMMARY OF ARGUMENT

This case does not present any question of the freedom of the United States Jaycees to associate exclusively with men. The Jaycees has chosen freely

and voluntarily to associate with women. It welcomes women as "associate" members. Indeed, it solicits, them; and formal and informal associations between men and women pervade the organization. Women are not aggrieved by exclusion from the Jaycees, but by the invidious deprivation of an equal share in the opportunities to which their association should entitle them. Women Jaycees may not vote, hold office or receive awards; but they attend the Jaycees' meetings, join in its civic, charitable and political activities, subscribe to its "Creed" and otherwise participate fully and visibly in all of its affairs. Women may be confined to the back of the Jaycees bus, but they are fully associated in every way with the Jaycees organization.

Precedents protecting the rights of various organizations to discriminate

freely in selecting or rejecting their associates from a pool of outside applicants can therefore lend the Jaycees no support. Regardless of whether the Jaycees is a private club or a public accommodation, regardless of whether its rights are purportedly grounded in the core of the First Amendment or in the less protected right to privacy, regardless of whether political advocacy is a decidedly minor part of its activities or its very reason for being, the Jaycees' reliance on the doctrine of free association is entirely misplaced. If the United States Jaycees prevails in this adjudication, its women members will be denied the same advantages enjoyed by their male colleagues; but women will continue to associate openly and publicly with the United States Jaycees. There is no issue here presented of the Jaycees being spared any unwanted

associations with women. Regardless of the outcome, women will continue to be recruited as Jaycees members and the Jaycees will continue, just as before, to advance whatever goals and beliefs it chooses to espouse.

Important rights are at stake in this case, but the freedom of the United States Jaycees to select its own associates is plainly not among them.

ARGUMENT

I. The Freedom Of Association Doctrine Affords The Jaycees No Right To Discriminate Against Persons With Whom It Has Chosen Freely To Associate

This Court has held unequivocally that the right of association is a "basic constitutional freedom," Buckley v. Valeo, 424 U.S. 1, 25 (1976) (quoting Kasper v. Pontikes, 414 U.S. 51, 57 (1973)), which "lies at the foundation of a free society," Buckley, 424 U.S. at 25 (quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960)). The Court has defined that constitutionally protected liberty as the "freedom to engage in association for the advancement of beliefs and ideas" and has further advised that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters" NAACP v. Alabama, 357

U.S. 449, 460 (1958). In one of its seminal opinions addressing the right to privacy, the Court has guaranteed associational freedoms to groups which merely "express" their ideas collectively, as well as to those which actively advocate them: "The right of 'association' . . . includes the right to express one's attitudes or philosophies in a group or by affiliation with it"; and the group at issue need not be political or religious in nature in order to enjoy a protected right of association. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

But these constitutional truisms lend no support to the United States Jaycees. Even if one assumes that all persons associated with the organization share common beliefs, attitudes, philosophies or ideas, it cannot be disputed that

those persons include women as well as men. In its Motion to Affirm, the Jaycees points out that "the Encyclopedia of Associations lists thousands of organizations . . . which limit their membership to a single sex, or to persons of one religious denomination or ethnic origin." Appellees' Motion to Affirm, Gomez-Bethke v. United States Jaycees, No. 83-724 (U.S. 1983), at 14-15 (hereinafter referred to as Motion to Affirm). Single gender organizations may well be commonplace in our society, but the United States Jaycees is not among them. The Jaycees has admitted many thousands of women members who involve themselves formally, openly and actively in every aspect of the organization's affairs with the full blessing and encouragement of the Jaycees' national leadership. To be sure, women are

restricted to "associate" membership status (a choice of terminology not entirely lacking in irony here). But that designation merely bars women from voting, holding office and receiving awards; it in no way restricts them from associating publicly and visibly with the Jaycees organization. Women are fully associated, not only with the Jaycees' civic, social and charitable activities but also with the advancement of its legislative reforms and quasi-political activities. Further, their involvement in those activities is not passive. Women frequently play an active and aggressive role in the organization's lobbying and other advocacy-oriented activities. They support the Jaycees financially through the payment of annual membership dues. They are not only welcomed but recruited into the organ-

ization. In sum, "[t]he national organization has settled on a policy that admits women to membership, but with the proviso that women shall not be accorded privileges that are full and equal to those accorded to men." United States Jaycees v. McClure, 305 N.W.2d 764, 765 (Minn. 1981).

Justice Douglas has stated the essence of the freedom of association doctrine as boldly and as baldly as it can be expressed:

The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

Moose Lodge No. 107 v. Irvis, 407 U.S.

163, 179-80 (1972) (Douglas, J.,
dissenting).

But government has never told the United States Jaycees who its associates must be. Whether or not the Jaycees' founders could have determined lawfully to establish an "all male club," they freely chose not to do so and not to be so "selective" as to exclude women. It is merely the full benefit of association with the United States Jaycees, not the association itself, which the Jaycees organization denies to its female members; and it is the right of a group to select its associates in the first instance, not to afford them disparate rights and privileges once they are selected, which is protected by the freedom of association doctrine.

In any event, as a Massachusetts administrative agency has found, the Jaycees is "an open organization with rapid turnover, whose associational claims are particularly weak. . . . [T]he balance of the interests clearly falls in favor of the nondiscrimination claim, before which the very attenuated associational claims must yield." Fletcher v. U.S. Jaycees, 3 Mass. Discrimination Law Rep. 1036 (Mass. Commission Against Discrimination 1981), Nos. 78-BPA--0058-0071, slip op. at 38. The Constitution places no value on discrimination and affords it no affirmative protection as a form of associational freedom. Norwood v. Harrison, 413 U.S. 455, 469-70 (1973).

Indeed, if any Jaycees have been denied a right of free association, it

can only be those who happen to be women. This Court has recognized that "classifications based upon sex are inherently invidious" Frontiero v. Richardson, 411 U.S. 677, 687 (1972) (Opinion of Brennan, J.); and "[i]nvidious discrimination takes its own toll on the freedom to associate" Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974). Even within the subordinate class to which they are relegated by the United States Jaycees, women similarly situated with men are afforded dissimilar treatment. Men who have passed the age of 35 are restricted, together with women, to associate membership; but associate men may continue to receive awards and recognition for their service and achievements; associate women may not.

"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. at 684. Women members of the United States Jaycees are now demanding an end to that invidious form of discrimination. Under current practices, they

are not able to achieve the same degree of personal growth or professional advancement as an associate member of the organization. In that lesser capacity, they are not able to hold office. They are thus deprived of the special leadership training . . . offered by the U.S. Jaycees to officers. They are less able to shape policy. They are barred from receiving awards of recognition and service. As one complainant testified, 'It would be like being allowed to go into a restaurant and being able to sit at a table with somebody else, but not being able to order or eat.'

Fletcher v. U.S. Jaycees, Nos.

78BPA0058-0071, slip op. at 16-17.

The Jaycees hierarchy cannot look to the freedom of association doctrine in defense of its policy of internal discrimination. The Jaycees seeks not to exclude unwanted outsiders but to afford unequal treatment to persons already inside its circle of freely chosen associates. In holding for the Jaycees below, the Court of Appeals has declared that its decision was "not controlled by precedent." United States Jaycees v. McClure, 709 F.2d 1560, 1576 (8th Cir. 1983), prob. juris. noted, 52 U.S.L.W. 3509 (U.S. January 9, 1984) (No. 83-724). Indeed, no other court has ever reached the incongruous conclusion that the freedom of association doctrine protects the "right" to discriminate invidiously

against one's own associates; and no reasonable construction of the doctrine can support that illogical result.

II. If Women Are Afforded Equal Treatment By The United States Jaycees, The Jaycees' Right To Express And Advance Its Ideas Will Not Be Impaired.

The elimination of internal discrimination against the United States Jaycees' female associates can have no impact on the Jaycees' privacy rights; nor can it inhibit the expression of any beliefs or ideas which the Jaycees may espouse. For these reasons alone, the Jaycees cannot rely on the freedom of association doctrine.

Even if the Jaycees argues that its privacy rights are at stake in this adjudication, "[i]t is questionable whether association not directed at the exercise of other First Amendment rights

enjoys constitutional protection. See L. Tribe, American Constitutional Law, at 702 (1976). Supreme Court cases upholding a right of freedom of association have involved association in connection with other protected First Amendment activities." United States Jaycees v. McClure, 534 F. Supp. 766, 770 (D. Minn. 1982) (citations omitted), rev'd, 709 F.2d 1560 (8th Cir. 1983), prob. juris. noted, 52 U.S.L.W. 3509 (U.S. January 9, 1984) (No. 83-724). In any event, even if the right of association may be rooted in the right to privacy, as well as in the core of First Amendment values, the Jaycees can surely assert no legitimate privacy claim before this Court. By freely admitting women into its ranks, the Jaycees has determined for itself that its privacy is not invaded by association with women.

Freedom to associate for the expression of ideas, as opposed to the right to privacy, is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Shelton v. Tucker, 364 U.S. 479, 486 (1960). But no impairment of that fundamental right can result from an action which does not impede protected speech or assembly. This is the ruling of Runyon v. McCrary, 427 U.S. 160 (1976). In Runyon, the Court held that the racial desegregation of a private school would in no way impinge upon the school's purported right of association, in part because "there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma." Id. at 176.

The Jaycees' discriminatory policy does not apply to its admission prac-

tices. It does not screen out persons who do not share the Jaycees' beliefs or ideas. Rather, it discriminates irrationally against women in the internal allocation of the rights and benefits of Jaycees membership. The elimination of such discrimination can have no inhibiting effect on the expression or advocacy of any "ideas or dogma" which the organization may claim to espouse.

The Court of Appeals appears to have weighed rather heavily in its analysis the existence of the Jaycees "Creed," an unexceptionable recitation contained in the organization's by-laws. The Court of Appeals surmised that "[t]hose who join the Jaycees identify themselves, emotionally and philosophically, with the beliefs expressed in the Creed," and concluded that the existence of the Creed

lends support to the Jaycees' status as a group of like-believing persons entitled to restrict their associations to those who share the same philosophy. United States Jaycees v. McClure, 709 F.2d at 1570. That analysis depends upon a false premise. Women Jaycees raise their right hands and recite the Creed just as their male colleagues do. The Creed appears on women's membership cards, just as it does on those that are issued to men. Like individual men, of course, individual women may differ in the extent to which they actually identify themselves with the principles set forth in the Creed; but there is no reason to believe that, as a class, Jaycees women identify themselves with those principles any less than Jaycees men do.

Nor is there any substance to the Court of Appeals' conjecture that "if

women become full-fledged members in any substantial numbers, it will not be long before efforts are made to change the Jaycee Creed. Young women may take a dim view of affirming the 'brotherhood of man,' or declaring how 'free men' can best win economic justice." Id. at 1571. But even if the most delicate semantic sensibilities may persuade some women to insist that the Creed be revised to affirm the "oneness of humankind" or to declare how "free people" can best win economic justice, it is difficult indeed to detect the resulting substantive damage to the Jaycees' philosophy. The Little League, for example, has had no success in convincing a court that the aims of its charter, which espouses "citizenship, sportsmanship and manhood" would in any way be threatened by the admission of girls. "[A]ssuming 'man-

hood,' in the sense of the charter, means basically maturity of character, just as does 'womanhood,' we fail to discern how and why little girls are not appropriate prospects for learning citizenship and sportsmanship, and developing character, as are boys." National Organization For Women, Essex Chapter v. Little League Baseball, Inc., 318 A.2d 33, 39 (N.J. Super. Ct. App. Div.), aff'd, 338 A.2d 198 (N.J. 1974).

The illogic of the Jaycees' reliance on the freedom of association doctrine is further made apparent by some of the arguments raised in its Motion To Affirm: "The State has dictated, by use of a penal statute, that Jaycees may no longer confine its core belief and central reason for its existence to the advancement of the interest of young male

members but must also serve the interests of young women." Motion To Affirm, supra, at 13-14.

The state has dictated no such thing. The Jaycees itself is probably the best judge of what its "core belief and the central reason for its existence" may be; but the Jaycees has chosen, as an entirely voluntary matter, to associate with women who, in turn, have chosen to associate with the Jaycees. The Jaycees' assertion that the simple step of affording its women associates the right to vote, hold office and receive awards will upset its "core beliefs," whereas mere association with such women will not, is simply absurd. Like that of the Court of Appeals, the Jaycees' assessment of the character of its organization seems to overlook the fact that women are already

in it. The Court of Appeals assumed, for example, that "[a]n organization of young people, as opposed to young men . . . will be substantially different from the Jaycees as it now exists." United States Jaycees v. McClure, 709 F.2d at 1571. In fact, of course, the Jaycees as it now exists is indisputably an organization of young people and not merely one of young men. Similarly, the Court of Appeals suggested that

[e]ven though we might think that the Jaycees would survive, even be improved, if women were admitted, some scope must be given to the private choice of those who are now in the organization. The right to choose with whom one will associate necessarily implies, within some limits, the right also to choose with whom one will not associate.

Id. at 1576.

That line of reasoning would be more persuasive were it not for the fact that

women have been admitted to the ranks of the Jaycees. "Those who are now in the organization" include women as well as men, and each group has chosen freely and voluntarily to associate with the other. If, as the Jaycees suggests, it is the interests of young men alone which the organization serves, and the interests of men and women are so inevitably certain to come into conflict, why are so many women associated with the group, and why is the group so ready and eager to have them?

Moreover, the Court of Appeals itself has conceded that even the most partisan political positions which the Jaycees has adopted are entirely gender-neutral in content. "Men are no more likely than women, as such, to favor the United Nations or a balanced budget." Id. at

1571. Indeed, the current U.S. Ambassador to the United Nations happens to be a woman, as is the current Director of the Congressional Budget Office.

The several courts which have addressed the question have held uniformly that the enforced termination of discrimination within a given organization has no constitutionally cognizable impact on the right to associate for the advancement of ideas. In Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 129 (S.D.N.Y. 1977), the court held that forbidding a law firm to discriminate against an associate attorney for promotion to partnership because of that attorney's ethnic group or religion "does not prevent the partners from associating for political, social and economic goals." The

"promotion" of Jaycees women from "associate" to "individual" membership status is closely analogous. Similarly, in United States v. International Longshoremen's Association, 460 F.2d 497, 501 (4th Cir.), cert. denied, 409 U.S. 1007 (1972), the court held that the forced merger of racially segregated union locals, both of which were contained within the same international union, "will not prevent longshoremen from associating to achieve economic and political goals." See also Runyon v. McCrary, 427 U.S. at 176; Alabama State Federation of Teachers v. James, 656 F.2d 193, 198 (5th Cir. 1981) (if a statute does not "prohibit or discourage" an organization "from advocating any particular idea" it places no burden whatever on associational interests).

In sum, because the United States Jaycees has chosen freely to associate with women, and because the elevation of Jaycees women from "associate" to "individual" membership status could have no impact on the Jaycees' right to associate for the purpose of expressing or advancing any goals or ideas, the freedom of association doctrine affords no support to the Jaycees in this adjudication.

CONCLUSION

The Association For Women Membership respectfully urges the Court to reverse the decision of the Court of Appeals and reinstate the decision of the District Court.

Respectfully submitted,

DANIELLE E. deBENEDICTIS
(Counsel of Record)

JAMES B. CONROY

Nutter, McClennen & Fish
600 Atlantic Avenue
Boston, MA 02210

Attorneys for Amicus Curiae
Alliance For Women Membership

February 23, 1984

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ALEXANDER L. STEVANS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, Commissioner, Minnesota Department of Human Rights; HUBERT H. HUMPHREY III, Attorney General of the State of Minnesota; and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,

Appellants,

—v.—

THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of itself and its qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION
AND MINNESOTA CIVIL LIBERTIES UNION
IN SUPPORT OF APPELLANTS**

LAURENCE H. TRIBE, *Counsel of Record*
MARTHA MINOW
KATHLEEN SULLIVAN
Griswold Hall 307
Cambridge, Massachusetts 02138
(617) 495-4621

BURT NEUBORNE
ISABELLE KATZ PINZLER
E. RICHARD LARSON
CHARLES S. SIMS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Counsel for Amici

QUESTION PRESENTED

Did the court below err in ruling that Minnesota's attempt to eliminate sex discrimination in public accommodations violated the associational rights of members of the Jaycees despite the fact that admitting women to full membership in the Jaycees would not interfere with the Jaycees' ability to advocate its traditional program of beliefs or ideas?

INDEX

Question Presented.....	i
Table of Cases.....	iii
Interest of Amici Curiae.....	1
Summary of Argument.....	3
Statement of the Case.....	7
Argument	
Introductory Statement.....	11
I. IN ERRONEOUSLY APPLYING STRICT SCRUTINY TO THE ENFORCEMENT OF AN ANTI-DISCRIMINATION STATUTE AIMED AT NEITHER EXPRESSION NOR ADVOCACY, NOR AT THEIR COLLECTIVE PURSUIT THROUGH GROUP ORGANIZATION, THE COURT BELOW IMPERMISSIBLY CONVERTED THE FREEDOM TO ASSOCIATE INTO A LICENSE TO SUBORDINATE.....	17
II. THE MINNESOTA ANTI-DISCRIMINATION STATUTE VIOLATES NO EXPRESSIVE OR PROTECTED ASSOCIATIONAL RIGHTS, FOR IT ADVANCES A SUBSTANTIAL STATE INTEREST WHOLLY UNRELATED TO RESTRICTING SPEECH OR ASSOCIATION, AND ITS INCIDENTAL IMPACT ON ASSOCIATION IS BOTH TRIVIAL AND NO GREATER THAN NECESSARY.....	24
Conclusion.....	32

TABLE OF CASES

<u>Brown v. Socialist Workers Party,</u> 103 S.Ct. 416 (1982).....	16,19
<u>Buckley v. Valeo,</u> 424 U.S. 1 (1976).....	16,17
<u>Califano v. Webster,</u> 430 U.S. 313 (1977).....	27
<u>Citizens Against Rent Control v City</u> <u>of Berkeley,</u> 454 U.S. 290 (1981).....	17
<u>The Civil Rights Cases,</u> 109 U.S. 3 (1883).....	12
<u>Daniel v. Paul,</u> 395 U.S. 298 (1969).....	12
<u>Frontiero v. Richardson,</u> 411 U.S. 677 (1973).....	22
<u>Goldsboro Christian Schools, Inc. v.</u> <u>United States,</u> 103 S.Ct 2017 (1983)...	12
<u>Griswold v. Connecticut,</u> 381 U.S. 479 (1965).....	13,19
<u>Heart of Atlanta Motel v. United States,</u> 379 U.S. 241 (1964).....	12,26
<u>Hishon v. King & Spalding,</u> No. 82-940, <u>appeal pending</u>	11,31
<u>Hoffman Estates v. Flipside, Hoffman</u> <u>Estates, Inc.,</u> 455 U.S. 489 (1982)....	10

<u>Hurd v. Hodge</u> , 334 U.S. 24 (1948).....	11
<u>Jones v. Alfred H. Mayer</u> , 392 U.S. 409 (1968).....	11
<u>Katzenbach v. McClung</u> 379 U.S. 294 (1964).....	12
<u>Loving v. Virginia</u> , 388 U.S. 1 (1967)....	13
<u>Meyer v. Nebraska</u> , 262 U.S. 390 (1923).....	13
<u>Moore v. City of East Cleveland</u> , 431 U.S. 494 (1977).....	13,14,19
<u>Moose Lodge v. Irvis</u> , 407 U.S. 163 (1972).....	26
<u>NAACP v. Alabama</u> , 357 U.S. 449 (1958)....	13, 17,18
<u>NAACP v. Button</u> , 371 U.S. 415 (1963)..	13,17
<u>Norwood v. Harrison</u> , 413 U.S. 455 (1973).....	12
<u>Pierce v. Society of Sisters</u> , 268 U.S. 510 (1925).....	13
<u>Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations</u> , 413 U.S. 376 (1973).....	11,30
<u>Railway Mail Ass'n. v. Corsi</u> , 326 U.S. 88 (1945).....	11,23,27
<u>Reed v. Reed</u> , 404 U.S. 71 (1971).....	22

<u>Runyon v. McCrary</u> , 427 U.S. 160 (1976).....	passim
<u>Schlesinger v. Ballard</u> , 419 U.S. 498 (1975).....	16,22
<u>Sherbert v. Verner</u> , 374 U.S. 398 (1963).....	13
<u>Sullivan v. Little Hunting Park, Inc.</u> , 396 U.S. 229 (1969).....	11
<u>Tillman v. Wheaton-Haven Recreation Ass'n.</u> , 410 U.S. 431 (1973).....	12,26
<u>United States v. Lee</u> , 455 U.S. 252 (1982).....	13,14
<u>United States v. O'Brien</u> , 391 U.S. 367 (1968).....	5,25
<u>United States v. Int'l Longshoreman's Ass'n.</u> , 460 F.2d 497, (4th Cir.), <u>cert. denied</u> , 409 U.S. 1007 (1972).....	28
<u>United States Jaycees v. McClure</u> , 305 N.W. 2d 764 (1981).....	8
<u>United States Jaycees v. McClure</u> , 709 F.2d 1560 (8th Cir. (1983)).....	8
<u>Wisconsin v. Yoder</u> , 406 U.S. 205 (1972).....	13

INTEREST OF AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members which is dedicated to protecting the fundamental rights of the people of the United States. The Minnesota Civil Liberties Union is the Minnesota state affiliate of the ACLU. The ACLU has been in the forefront in the defense of First Amendment rights, including the right to freedom of association which amici believe is improperly asserted by the appellee in this case.

One of the major civil liberties issues facing the United States is the elimination of all vestiges of racism and sexism, and the wholly justified demand of women and minorities for equal access to opportunities

* The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

from which they have been excluded. In numerous cases before this Court, the ACLU has challenged discrimination against minorities and women under the Fifth and Fourteenth Amendments, and has also urged the vigorous enforcement of civil rights laws designed to remedy the causes and effects of such prohibited and invidious discrimination.

SUMMARY OF ARGUMENT

I

Associational activity for the advancement or advocacy of beliefs and ideas and for their collective pursuit through group organization is fully protected by the First Amendment. Where state action curtails this protected right, it is properly subjected to strict judicial scrutiny.

The court below, however, erroneously enjoined the enforcement of a facially valid state anti-discrimination law that does not aim at the expression or advocacy of ideas or beliefs, does not make any content based distinction between prohibited and permitted associational or expressive activity, and has no substantial or even discernible effect on a group's political expression or advocacy. The court based its decision upon an unsupported hypothesis that the

systematic relegation of female members of the Jaycees to inferior roles within the organization was indispensable to the expression and advocacy of the organization's ideas and beliefs, none of which are remotely the province exclusively of men. By indulging in forbidden sex stereotyping, the majority below impermissibly refashioned the traditional shield of freedom of association into a sword against excluded or subordinated groups - an inversion which this Court has refused to sanction even where protected ideas about exclusionary practices were involved. Runyon v. McCrary 427 U.S. 160,176 (1976). Since the very purpose of freedom of association is the protection of minority views from suppression by the powerful, the concept cannot be impermissibly converted into a license to subordinate.

II

Because the law at issue here aims at eliminating sex discrimination, a goal wholly independent of speech or association, it can be sufficiently justified under United States v. O'Brien 391 U.S. 367, 377 (1968) if it is within the constitutional power of the state and furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on the alleged associational right is no greater than is necessary to the furtherance of that interest. Minnesota's goals of eliminating sex discrimination in businesses that sell goods or services to the public and of preventing the deprivation of personal dignity and securing of equal rights and overcoming economic disparities between the sexes are plainly substantial state

interests falling well within its constitutional power. Any constriction of the Jaycees' expressive and associational freedoms brought by enforcement of the Act, if indeed any such constriction could be identified at all, is surely no greater than necessary to achieve its anti-discriminatory purpose. Indeed, as the court below concedes, the state's central purpose here can be achieved only by forbidding the systematic subordination of women within organizations such as the Jaycees; any incidental infringement of associational rights is a necessary price, and in this case also a trivial one.

STATEMENT OF THE CASE

The issue in this case is whether the United States Jaycees' practice of relegating the women to whom it sells memberships to an inferior position within the organization -- by denying them the right that male members enjoy to vote, hold office, or receive awards¹ -- deserves immunity from a facially valid state anti-discrimination law² by virtue of the

1. The Jaycees' By-Laws provide for the admission only of "young men" to full "Individual" membership, allowing young women merely "Associate" membership without comparable rights.

2. The Minnesota Human Rights Act provisions whose application is at issue in this case prohibit, as an "unfair discriminatory practice," the denial of "full and equal enjoyment" of the "goods, services, facilities, privileges, advantages, and accommodations" of any "place of public accommodation" on the basis of "race, color, creed, religion, disability, national origin, or sex." Minn., Stat. Ann. §§363.01 & §363.03. The Minnesota Supreme Court, on certification from the district court below, held the Jaycees a "place of public accommodation" within the meaning of this [cont'd. on next pg]

organization's purported First Amendment right of association. The majority of the court of appeals below, reversing the district court, found such immunity for the Jaycees' discriminatory practice. United States Jaycees v. McClure, 709 F.2d 1560, 1566-76 (8th Cir. 1983). The majority held that, although the Jaycees -- a 300,000 member organization which "'market[s]" its memberships aggressively to the public, id. at 1569 -- is "not an intimate group" and is "hardly a private club," id. at 1571, its right to associate for the collective advancement of protected "belief and expression," id. at 1571, was impermissibly abridged by the state's requirement that it extend "full-fledged" membership to women as

state law -- based on the fact that it sells a "product" (leadership skills) to "customers" (those members of the public enticed to buy memberships). United States Jaycees v. McClure, 305 N.W. 2d 764, 769 (1981).

a condition of doing business in the state, id. Finding that women's full membership would inevitably "change...the Jaycees' philosophical cast" even though "the specific content of most of the resolutions adopted over the years has nothing to do with sex," id., the court of appeals majority concluded that the state's interest in preventing sex discrimination in public accommodations was insufficiently "compelling" to override the Jaycees' associational rights, id. at 1572-73. The outer boundary of the state's power to enforce its interest, the majority suggested, was to be drawn at such "less...intrusive" and concededly "less...effective" means as urging state officials not to patronize discriminatory organizations like the Jaycees. Id. at 1573. The dissent, in contrast, would have found that the state's "compelling interest in eradicating second-

class citizenship in places of public accommodation" easily overwhelmed any rights the Jaycees might claim against a statute whose enforcement threatened neither the associational purpose of the organization-- which embrace interests "not solely 'young men's'" Id. at 1580 (Lay, C.J., dissenting) -- nor the exercise of the organization's "speech and advocacy of public causes," id.³

3. The majority of the court of appeals also ruled, in the alternative and again over Judge Lay's dissent, that the Minnesota law was void for vagueness because lacking an "ascertainable standard for the inclusion of some groups as 'public' and the exclusion of others as 'private'." 709 F.2d at 1578. This ruling is so flatly wrong as to require little discussion. The prohibition of invidious discrimination enacted in the Minnesota Human Rights Act plainly does not directly infringe the speech or advocacy of the Jaycees or any other group as such. Nor does it indirectly infringe any interest legitimately protected by the First Amendment. see Argument infra. Since the law thus does not reach a substantial amount of constitutionally protected conduct, it must be shown "impermissibly vague in all of its applications" before it can be voided for vagueness. See Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982). Such a showing would be [cont'd. on next pg]

ARGUMENT

Introductory Statement

The occasional tension between associational freedom and equality is no stranger to this Court. Whether it has arisen in the context of employment⁴, housing⁵, education⁶ or access to public

impossible with respect to a distinction as long-applied and well-defined by both state and federal courts as that between public accommodations from which invidious discrimination may be banned and private groups from which it may not. See 709 F.2d at 1582 (Lay, C.J., dissenting).

4. Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945) (exclusion of Blacks from labor union); Hishon v. King & Spaulding, No. 82-940, appeal pending (exclusion of women from opportunity to become partner in law firm). Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

5. Hurd v. Hodge, 334 U.S. 24 (1948) (unenforceability of racial restrictive covenants); Jones v. Alfred H. Mayer, 392 U.S. 409 (1968), Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (racial discrimination in sale or rental of private housing). See, 42 U.S.C. §§3601 et. seq. (1970 & Supp. V 1975).

6. Runyon v. McCrary, 427 U.S. 160 (1976) (racial discrimination in admission to [cont'd. on next pg])

accommodations ⁷, individuals have attempted to avoid democratic judgments condemning discrimination by alleging a constitutionally protected freedom to associate - and to refrain from associating - with persons of their choice.

Taken literally, of course, such an unbounded freedom to dis-associate would cripple the guarantees of equality contained in the Constitution and our Civil Rights statutes, since every ban on discrimination would be checkmated by an assertion of individual autonomy phrased as a claim of associational freedom. On the other hand,

private school). See also, Norwood v. Harrison, 413 U.S. 455 (1973); Goldsboro Christian Schools, Inc. v. United States, 103 S.Ct. 2017 (1983).

7. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung 379 U.S. 294 (1964); Daniel v. Paul, 395 U.S. 298 (1969); Tillman v. Wheaton-Haven Recreation Ass'n., 410 U.S. 431 (1973) (racial discrimination in access to public accommodations). See also, The Civil Rights Cases, 109 U.S. 3 (1883).

claims of associational freedom cannot be rejected out of hand, since, in certain circumstances, associational freedom is critical to the preservation of political⁸, religious⁹ and personal¹⁰ freedom.

Not surprisingly, therefore, when associational freedom has been urged as a counterweight to a democratic condemnation of discrimination, this Court has uniformly rejected the challenge when the challengers were unable to prove that the prohibition on discrimination threatened their political, religious or personal freedom. Thus, in Railway Mail Ass'n. v. Corsi, 326 U.S. 88

8. Eg. NAACP v. Alabama, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963).

9. Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); United States v. Lee, 455 U.S. 252 (1982).

10. Moore v. City of East Cleveland, 431 U.S. 494 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967). See Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

(1945), the Court rejected an argument that a prohibition on racial discrimination in labor union membership violated the white members' associational freedom. Similarly, in Runyon v. McCrary, 427 U.S. 160 (1976), the Court rejected an argument that a ban on racial discrimination in admission to private schools violated the associational rights of white parents. In both Corsi and Runyon, the Court recognized that a claim of associational right which is not tied closely to the enjoyment of political or religious¹¹ liberty is, in essence, a general claim of autonomy; a claim to be free of the regulatory reach of the law. It is a claim that courts may honor when personal bonds of transcendent significance are at stake.¹² It is not a claim, however,

11. The mere assertion of even a religious claim to autonomy does not assure exemption. United States v. Lee, 455 U.S. 252 (1982).

12. Eg. Moore v. City of East Cleveland, [cont'd. on next pg]

that can be plausibly asserted by members of a mass nationwide association devoted to the development of leadership skills and business acumen.

Indeed, the labored attempt by the majority below to establish a nexus between the Jaycees' political goals and the exclusion of women from full membership exposes the inherent weakness of the Jaycees' assertion of associational freedom. Since, as all concede, the Jaycees' political program does not advocate male supremacy or superiority, the admission of women as full members cannot impact on the political freedom of male Jaycees - unless one assumes that women Jaycees as a group will express differing political views merely because of their sex. The majority below appears to have harbored such an outdated - and unconstitutional -

431 U.S. 494 (1977).

stereotypical view of women. Compare, Schlesinger v. Ballard, 419 U.S. 498, 508 (1975). If, however, one assumes that individual women who join the Jaycees will express themselves as individuals and not as female robots, the ephemeral nexus constructed by the majority below disappears, leaving no basis whatever for a serious claim of associational freedom from a ban on sex discrimination.¹³

13. Even if one were to accept the possibility that admitting women might change the political complexion of the Jaycees -- a wholly unsupportable assumption -- the burden of proving impact on political association rests clearly with the Jaycees. Buckley v. Valeo, 424 U.S. 1 (1976); Brown v. Socialist Workers Party, 103 S.Ct. 416 (1982). Whatever the size of the burden, it cannot possibly be satisfied by stereotypical speculation about how women as a group might vote if admitted to full membership in the Jaycees.

I. IN ERRONEOUSLY APPLYING STRICT
SCRUTINY TO THE ENFORCEMENT OF AN
ANTI-DISCRIMINATION STATUTE AIMED AT
NEITHER EXPRESSION NOR ADVOCACY, NOR
AT THEIR COLLECTIVE PURSUIT THROUGH
GROUP ORGANIZATION, THE COURT BELOW
IMPERMISSIBLY CONVERTED THE FREEDOM TO
ASSOCIATE INTO A LICENSE TO
SUBORDINATE.

Associational activity "for the
advancement of beliefs and ideas," NAACP v.
Alabama, 357 U.S. 449, 460 (1958), and for
the advocacy of collective interests, see
NAACP v. Button, 371 U.S. 415, 430 (1963),
is fully protected by the First Amendment.
See, e.g., Citizens Against Rent Control v.
City of Berkeley, 454 U.S. 290 (1981);
Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per
curiam). Such protection has long been
viewed as essential to preserve diversity in
our society by shielding minority and
dissident expression and advocacy from
suppression by the majority. See, e.g.,
NAACP v. Button, 371 U.S. at 431 (protection
of minority group advocacy helps to

vindicate "the distinctive contribution of a minority group to the ideas and beliefs of our society"); NAACP v. Alabama, 357 U.S. at 462 (associational freedom especially important where group espouses dissident belief). Where state action curtails such collective expression or advocacy, it is accordingly "subject to the closest scrutiny." Id. at 460-61.

Where, in contrast, a group's associational expression or advocacy is at most only marginally affected -- as the Jaycees claim it to be here by a facially valid state anti-discrimination law that neither aims at the expression or advocacy of any ideas or beliefs, nor makes any content-based distinction between prohibited and permitted associational or expressive activity -- strict scrutiny is utterly inappropriate unless the alleged infringement would demonstrably threaten the

group's expressive enterprise. cf. Brown v. Socialist Workers Party, 103 S.Ct. 416

(1982) (immunity from membership disclosure rule). The court below purported to find just such a threat to the Jaycees'

"political and ideological" enterprise posed here by the state's conditioning the Jaycees' doing business in the state upon its equal treatment of women and men. See 709 F.2d at 1517-7.¹⁴ Specifically, the court found that application of the anti-discrimination statute to the Jaycees would "go[] to the heart of" its associational liberty by preventing it from continuing

14. Nothing in the court's decision turned on any notion that the Jaycees enjoyed a fundamental right to intimate association, see Moore v. City of East Cleveland, 431 U.S. 494 (1977) (extended family); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (marriage) -- a right the Jaycees could hardly colorably assert in light of the large size of even its local chapters (see JSA at A-93), and the impersonal and unselective nature of its growth through sales of memberships for a fee.

what the court viewed as its central expressive mission: "advanc[ing] the interests of young men," and affirming the "'brotherhood of man,'" see id. at 1571 [emphasis added].

Nothing in the record below, however, supports the court's bold "hypothesis," see id. at 1581 (Lay, C.J. dissenting), that the systematic relegation of female members of the Jaycees to inferior roles within the organization is indispensable to -- or indeed, even relevant to -- the expression and advocacy which the Jaycees is organized to advance. Among the very Jaycee activities adduced in the record which the court stresses are so "political and ideological" as to trigger First Amendment protection in the first place -- for example, the Jaycees' advocacy against government deficits, for the disabled, for school prayer, and for the economic

development of Alaska, id., at 1569 (majority opinion) -- none can remotely be said even to involve interests exclusively the province of men. A fortiori, the subordination of women within the Jaycees cannot be said to advance the organization's articulation and advocacy of its positions on such matters. It is simply not as and for men, but as and for civic and business leaders, that the Jaycees pursue such associational advocacy.

By ignoring the obvious inference from the record that the Jaycees' associational advocacy, as the majority below itself conceded, "has nothing to do with sex." id. at 1571, and by casting about instead for its own link between the Jaycees' expression of ideas and its rationale for subordinating women to men, the court below not only violated its obligation to govern

evenhandedly,¹⁵ but also impermissibly refashioned the traditional shield of associational freedom into a novel sword against excluded or subordinated groups -- an inversion this Court has long refused to sanction even where protected ideas about exclusionary practices were involved as they have not been shown to be here.

For example, while parents may assert under the First Amendment a "right to send their children to educational institutions that promote the belief that racial segregation is desirable," this Court has stated that "it does not follow that the practice of excluding racial minorities from

15 Indeed, the court's surmise that women, if elected to full Jaycee membership, would betray a different "attitude of mind" about economic justice, see 709 F.2d at 1571 -- whatever the court might mean -- amounts to unconstitutional adjudication by archaic sexual stereotype. See Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

such institutions is also protected by the same principle." Runyon v. McCrary, 427 U.S. 160, 176 (1976). Cf. Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945)(rejecting a claim of associational protection for a labor union's effort to exclude Black members as a distortion of the Fourteenth Amendment, which was enacted to bar state discrimination). Indeed, where such exclusionary practices have been involved, this Court, far from allowing such casual inferences of loose nexus between forbidden discrimination and protected association as the court made here, has required a clear showing of close nexus: namely, a showing that "discontinuance of discriminatory admission practices would inhibit" the expression of ideas by an association's membership. See Runyon v. McCrary, 427 U.S. at 176. By applying strict scrutiny on the basis of a mere

hypothesis of such a nexus, the court below turned the very purpose of the freedom of association -- the protection of minority views from suppression by those relatively more powerful -- impermissibly on its head, finding in the freedom to associate a boundless license to subordinate.

II. THE MINNESOTA ANTI-DISCRIMINATION STATUTE VIOLATES NO EXPRESSIVE OR PROTECTED ASSOCIATIONAL RIGHT, FOR IT ADVANCES A SUBSTANTIAL STATE INTEREST WHOLLY UNRELATED TO RESTRICTING SPEECH OR ASSOCIATION, AND ITS INCIDENTAL IMPACT ON ASSOCIATION IS BOTH TRIVIAL AND NO GREATER THAN NECESSARY.

Because the Minnesota law at issue here, as noted above, does not directly aim at the expression of ideas or at associational advocacy, nor even discernibly infringe those activities indirectly, but aims rather (in relevant part) at eliminating sex discrimination -- a goal wholly independent of speech or association -- the Jaycees' claim that the law infringes

their associational rights can properly be tested pursuant to a standard of review far more relaxed than that applied by the court below -- namely, by the standard of review announced in United States v. O'Brien, 391 U.S. 367, 377 (1968):

[W]e think it clear that the government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

This standard is amply met here.

First, the Minnesota Act's goal of eliminating sex discrimination in businesses that sell goods or services to the public -- as the Jaycees sell memberships and their attendant benefits -- is plainly a substantial state interest falling well

within a state's constitutional power.¹⁶
Securing equal rights of access, regardless of sex -- to public accommodations, no less than to education, employment, housing, and credit -- is a central commitment of numerous statutory schemes, both state and federal because preventing the "deprivation of personal dignity [that] surely accompanies denial of equal access to public establishments," see Heart of Atlanta Motel v. United States, 379 U.S. 241, 250

16. That the state here claims the power to forbid sex discrimination in businesses and facilities qualifying as "places of public accommodation" in no way entails that the state would have a federal constitutional duty to do so. Nor does the fact that a business like the Jaycees' may be public enough to come legitimately within the state's regulatory power entail that the state's failure to ensure equal access to membership regardless of sex would amount to discriminatory state action. Thus the outer contours of state action in the context of social, fraternal, or recreational associations, see e.g., Moose Lodge v. Iris, 407 U.S. 163, 173, 177 (1972); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 437 (1973), need not be reached or even considered here. / / /

(1964)(race discrimination), advances a legitimate and important state interest in remedying discrimination. Nor is the state interest lessened when the denial of equal public access consists, as here, of admission on subordinate terms that earmark one as a second-class citizen. Cf. Railway Mail Ass'n v. Corsi, 326 U.S. at 94. Moreover, securing equal rights of access for women to the traditionally male-only civic and business privileges of a public organization such as the Jaycees advances a legitimate and substantial state interest in overcoming economic disparities between the sexes. See, e.g., Califano v. Webster, 430 U.S. 313 (1977) (per curiam).

Second, whatever marginal constriction of the male Jaycees' expressive and associational freedoms enforcement of the Act might bring about incidental to its elimination of a sex-discriminatory practice,

that constriction is surely no greater than necessary to achieve its anti-discriminatory purpose.

It is difficult, in fact, to identify any such constriction. The state has not required the Jaycees to change or forego any creed, message, or political activity. See United States v. Int'l Longshoreman's Ass'n, 460 F.2d 497, 501 (4th Cir.), cert. denied, 409 U.S. 1007 (1972). And any claim of state infringement of symbolic messages that might be conveyed by Jaycee membership practices would be dubious at best in light of the fact that the Jaycees already voluntarily solicit and admit women members to enjoy its social activities, to accede to its creed, to learn its philosophy, and to participate in its leadership-training and community-service activities -- in short, to participate in most Jaycee collective activities so long as those activities are chosen and governed

solely by men, who alone have the power to vote and hold office. Any message to the effect that "women cannot and should not be civic and business leaders" is simply not one that the Jaycees seek collectively to promulgate.¹⁷

Moreover, the Jaycees' associational interest in advocating on behalf of "young men" -- the interest focused on by the court below -- must be viewed as at best tangential to an organization that already admits women and that advocates a host of political, economic, and spiritual messages utterly unrelated to the sex of their proponents; any infringement of this interest by elevation of women to full membership in the Jaycees must

17. The question whether such an associational creed might ever suffice to justify the exclusion or subordination of women, like the question whether an association formed around a creed of white supremacy might ever have First Amendment immunity from a state law barring denial of access by blacks on an equal basis, therefore need not be reached here. / / /

similarly be viewed as at best attenuated since there can be no guarantee, even if people did vote with their sex, that those women who wish to join the Jaycees would in fact vote for anything that did not advance the interests of young men as the Jaycees has traditionally conceived them. In short, the Jaycees have suggested no infringement here that even mildly threatens its "institutional viability," cf. Pittsburgh Press, 413 U.S. at 382.

In contrast, the state's central purpose here -- the elimination of sex discrimination in those businesses and facilities that open themselves to the state's public -- can be achieved only by forbidding the systematic subordination of women within such organizations; any incidental infringement of associational rights is simply a necessary price, if in this case also a trivial one. No less could the systematic subordination of

women as associate employees of law partnerships be achieved without some necessary incidental infringement of the partners' associational freedom to promote and enjoy co-ownership and governance only with other men. Cf. Hishon v. King & Spaulding, No. 83-940, appeal pending. No "less restrictive" alternative sufficient to achieve the state's ends is realistically imaginable.¹⁸

18. The suggested "less restrictive" means conjured by the court below, see 709 F.2d at 1573, for increasing the desegregation of the Jaycees must in any event be dismissed as ineffectual to accomplish the state's goals, as the court itself conceded, id.

CONCLUSION

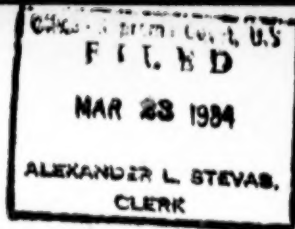
For the above-stated reasons, the decision of the Court below should be reversed.

Respectfully submitted,

LAURENCE H. TRIBE,
Counsel of Record
MARTHA MINOW
KATHLEEN SULLIVAN
Griswold Hall 307
Cambridge, Mass. 02138
(617) 495-4621

BURT NEUBORNE
ISABELLE KATZ PINZLER
E. RICHARD LARSON
CHARLES S. SIMS
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800
Counsel for Amici

No. 83-724



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

KATHRYN R. ROBERTS, Acting Commissioner,
Minnesota Department of Human Rights; *et al.*,
Appellants,

v.

THE UNITED STATES JAYCEES,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF OF THE BOY SCOUTS OF AMERICA
AS AMICUS CURIAE
IN SUPPORT OF AFFIRMANCE**

Of Counsel:

DAVID K. PARK
General Counsel

PHILIP A. LACOVARA
(Counsel of Record)
MALCOLM E. WHEELER
GEORGE A. DAVIDSON
GEOFFREY F. ARONOW

BOY SCOUTS OF AMERICA
1325 Walnut Hill Lane
Irving, Texas 75062
(214) 659-2005

HUGHES HUBBARD & REED
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 626-6200

*Attorneys for the
Boy Scouts of America*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTEREST OF THE AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT	5
I. FREEDOM OF ASSOCIATION HAS AN INDEPENDENT CONSTITUTIONAL STATUS	5
A. The Right To Join With Others.....	6
B. The Right To Privacy	12
II. THE STATE'S ABILITY TO DEMON- STRATE AN ADEQUATELY COM- PELLING BASIS FOR INTERFERING WITH THE FREEDOM OF ASSOCI- ATION DEPENDS UPON THE NATURE OF THE ASSOCIATIONAL INTEREST AT STAKE AND THE NATURE OF THE GOVERNMENT REGULATION	16
A. Is The Primary Principle Or Goal Ani- mating The Association Commercial? ..	18
B. Is The Interest In Associational Pri- vacy Limited By The Essentially Com- mercial Nature Of The Association?	19
C. Are The Government's Interests Suffi- ciently Compelling?	22
III. THE DECISION BELOW IS CORRECT UNDER THE PROPER TEST	27
CONCLUSION	30

TABLE OF AUTHORITIES

	<u>Page</u>
CASES:	
<i>Alfred L. Snapp & Son, Inc. v. Puerto Rico</i> , 458 U.S. 592 (1982)	23
<i>Bates v. City of Little Rock</i> , 361 U.S. 516 (1960)	10
<i>Bell v. Maryland</i> , 378 U.S. 226 (1964)	20
<i>Bob Jones University v. United States</i> , ____ U.S. ____ , 103 S.Ct. 2017 (1983)	22,26
<i>Brotherhood of Railroad Trainmen v. Virginia</i> , 377 U.S. 1 (1964)	11
<i>Brown v. Socialist Workers '74 Campaign Committee (Ohio)</i> , 459 U.S. 87 (1982)	18
<i>Citizens Against Rent Control v. City of Berkeley</i> , 454 U.S. 290 (1981)	18
<i>Cleveland Board of Education v. LaFleur</i> , 414 U.S. 632 (1974)	15
<i>Cornelius v. Benevolent Protective Order of the Elks</i> , 382 F. Supp. 1182 (D. Conn. 1974)	21
<i>Cousins v. Wigoda</i> , 419 U.S. 477 (1975)	23
<i>Craig v. Boren</i> , 429 U.S. 190 (1976)	23
<i>Curran v. Mt. Diablo Council of the Boy Scouts of America</i> , 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), <i>hearing denied</i> (Cal. January 6, 1984), <i>appeal pending</i> , No. 83-1513 (U.S., filed March 14, 1984)	2,18
<i>Daniel v. Paul</i> , 395 U.S. 298 (1969)	21,22
<i>Democratic Party v. Wisconsin ex rel. La Follette</i> , 450 U.S. 107 (1981)	11,18
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	17
<i>Evans v. Newton</i> , 382 U.S. 296 (1966)	26
<i>Fesel v. Masonic Home of Delaware, Inc.</i> , 428 F. Supp. 573 (D. Del. 1977), <i>aff'd mem.</i> , 591 F.2d 1334 (3rd Cir. 1979)	26
<i>First National Bank v. Bellotti</i> , 435 U.S. 765 (1978)	19

	<u>Page</u>
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973)	23
<i>Garcia v. Texas State Board of Medical Examiners</i> , 384 F. Supp. 434 (W.D. Tex. 1974) (three-judge court) (<i>per curiam</i>), <i>aff'd mem.</i> , 421 U.S. 995 (1975)	19
<i>Gibson v. Florida Legislative Investigation Committee</i> , 372 U.S. 539 (1963)	9,10
<i>Gilmore v. Montgomery</i> , 417 U.S. 556 (1974)	12
<i>Ginsberg v. New York</i> , 390 U.S. 629 (1968)	13
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	10,13
<i>Healy v. James</i> , 408 U.S. 169 (1972)	6,10,17
<i>In re Primus</i> , 436 U.S. 412 (1978)	10-11, 18,23
<i>International Association of Machinists v. Street</i> , 367 U.S. 740 (1961)	24
<i>ICC v. Brimson</i> , 154 U.S. 447 (1894)	13
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	15
<i>Larson v. Valente</i> , 456 U.S. 228 (1982)	18
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967)	15
<i>Minnesota State Board for Community Colleges v. Knight</i> , ____ U.S. ____, 52 U.S.L.W. 4204 (February 21, 1984)	12
<i>Moose Lodge No. 102 v. Irvis</i> , 407 U.S. 163 (1972)	12
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958)	10,11, 18,28
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	18,28
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	18
<i>Nesmith v. Young Men's Christian Association</i> , 397 F.2d 96 (4th Cir. 1968)	21
<i>NLRB v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979)	18
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973)	26

	<u>Page</u>
<i>Ohralik v. Ohio State Bar Association</i> , 436 U.S. 447 (1978)	19,24
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928) ..	14,17
<i>Olzman v. Lake Hills Swim Club, Inc.</i> , 495 F.2d 1333 (2nd Cir. 1974)	21
<i>Orr v. Orr</i> , 440 U.S. 268 (1979)	23
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925) ..	15
<i>Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations</i> , 413 U.S. 376 (1973)	19
<i>Pollard v. Quinpiac Council, Boy Scouts of America</i> , PA-SEX-37-3 (Conn. Comm. on Human Rights and Opportunities) (decision of hearing examiner, January 4, 1984), <i>petition for review filed</i> (Conn. Super. Ct. January 19, 1984)	2
<i>Presbyterian Church v. Hull Memorial Presbyterian Church</i> , 393 U.S. 440 (1969)	18
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944)	15
<i>Quijano v. University Federal Credit Union</i> , 617 F.2d 129 (5th Cir. 1980)	21
<i>Railway Mail Association v. Corsi</i> , 326 U.S. 88 (1945)	25
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980)	6
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	15
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	22
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	6,11,18
<i>Sigma Chi Fraternity v. Regents of the University of Colorado</i> , 258 F. Supp. 515 (D. Colo. 1966) ..	26
<i>Smith v. Organization of Foster Families</i> , 431 U.S. 816 (1977)	15
<i>Smith v. Young Men's Christian Association</i> , 462 F.2d 634 (5th Cir. 1972)	21
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969)	13,14
<i>Sullivan v. Little Hunting Park</i> , 396 U.S. 229 (1969)	22

	<u>Page</u>
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957) ..	11
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945)	11
<i>Tillman v. Wheaton-Haven Recreation Association</i> , 410 U.S. 431 (1973)	21
<i>TVA v. Hill</i> , 437 U.S. 153 (1978)	29
<i>United States v. Bob Lawrence Realty, Inc.</i> , 474 F.2d 115 (5th Cir.), <i>cert. denied</i> , 414 U.S. 826 (1973)	22
<i>United States v. International Longshoremen's Association</i> , 460 F.2d 497 (4th Cir.), <i>cert. denied</i> , 409 U.S. 1007 (1972)	25
<i>United States v. Jacksonville Terminal Co.</i> , 451 F.2d 418 (5th Cir. 1971), <i>cert. denied</i> , 406 U.S. 906 (1972)	25
<i>United States v. Lee</i> , 455 U.S. 252 (1982)	17,18
<i>United States v. Slidell Youth Football Association</i> , 387 F. Supp. 474 (E.D. La. 1974)	21-22
<i>University of California Regents v. Bakke</i> , 438 U.S. 265 (1978)	11
<i>Virginia Pharmacy Board v. Virginia Consumer Council</i> , 425 U.S. 748 (1976)	19
<i>Wright v. Salisbury Club, Ltd.</i> , 632 F.2d 309 (4th Cir. 1980)	22
<i>Wright v. The Cork Club</i> , 315 F. Supp. 1143 (S.D. Tex. 1970)	21

U.S. CONSTITUTION:

Amendment I	<i>passim</i>
Amendment III	13
Amendment IV	13,15
Amendment V	15
Amendment IX	15

STATUTES:

36 U.S.C. § 23	2
42 U.S.C. § 2000a(e)	21,22
42 U.S.C. § 2000e(b)	22
42 U.S.C. § 2000e-1	22
42 U.S.C. § 3603	22
42 U.S.C. § 3607	22

MISCELLANEOUS:

M. Abernathy, <i>THE RIGHT OF ASSEMBLY AND ASSOCIATION</i> (2nd ed. 1981)	8,11,12
C. Antieau, <i>RIGHTS OF OUR FATHERS</i> (1968)	6-7
E. Bloustein, <i>INDIVIDUAL AND GROUP PRIVACY</i> (1978)	15-16,24
T. Cooley, <i>A TREATISE ON THE CONSTITUTIONAL LIMITATIONS</i> (5th ed. 1883)	13
A. De Tocqueville, <i>DEMOCRACY IN AMERICA</i> (P. Bradley ed. 1945)	6,8
<i>Developments in the Law: Judicial Control of Actions of Private Associations</i> , 76 Harv. L. Rev. 983 (1963)	12,25,26
Dixon, <i>The Griswold Penumbra</i> , in <i>THE RIGHT TO PRIVACY: A SYMPOSIUM ON THE IMPLICATIONS OF GRISWOLD V. CONNECTICUT</i> (1971) ..	15
Douglas, <i>The Right of Association</i> , 63 Colum. L. Rev. 1361 (1963)	7
Emerson, <i>Freedom of Association and Freedom of Expression</i> , 74 Yale L.J. 1 (1964)	9,20
Emerson, <i>Nine Justices in Search of a Doctrine</i> , in <i>THE RIGHT TO PRIVACY: A SYMPOSIUM ON THE IMPLICATIONS OF GRISWOLD V. CONNECTICUT</i> (1971)	14
D. Fellman, <i>THE CONSTITUTIONAL RIGHT OF ASSOCIATION</i> (1963)	7,8
R. Horn, <i>GROUPS AND THE CONSTITUTION</i> (1956)	7,8,12

	<u>Page</u>
Note, <i>Association, Privacy and the Private Club: The Constitutional Conflict</i> , 5 Harv. C.R.—C.L. L. Rev. 460 (1970)	16
Note, <i>Discrimination in Private Social Clubs: Freedom of Association and Right of Privacy</i> , 1970 Duke L. J. 1181	19,20
Note, <i>Public Accommodations Laws and the Private Club</i> , 54 Geo. L. J. 915 (1966)	24
C. Rice, FREEDOM OF ASSOCIATION (1962)	6,7,11
Rice, <i>The Constitutional Right of Association</i> , 16 Hastings L. J. 491 (1965)	11
Schlesinger, <i>Biography of a Nation of Joiners</i> , 50 Am. Hist. Rev. 1 (1944)	7,8
A. Schlesinger, PATHS TO THE PRESENT (1949)	8
L. Tribe, AMERICAN CONSTITUTIONAL LAW (1978)	15,16
A. Westin, PRIVACY AND FREEDOM (1967)	12,13,16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-724

KATHRYN R. ROBERTS, Acting Commissioner,
Minnesota Department of Human Rights; *et al.*,
Appellants,

v.

THE UNITED STATES JAYCEES,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF OF THE BOY SCOUTS OF AMERICA
AS AMICUS CURIAE
IN SUPPORT OF AFFIRMANCE**

The Boy Scouts of America, as *amicus curiae*, supports affirmance of the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case. 709 F.2d 1560.

INTEREST OF THE AMICUS CURIAE

The Boy Scouts of America is a voluntary, nonprofit membership organization chartered by Congress in 1916

“to promote, through organization, and cooperation with other agencies, the ability of boys to do

things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues." 36 U.S.C. § 23.

Through hundreds of local councils and thousands of individual Scout troops, Cub packs and Explorer posts, the Boy Scouts brings the Scouting program to more than three million American youths. Parents of Boy Scouts have entrusted the safety and welfare of their children to the adult volunteer members of the Boy Scouts, who supervise Boy Scouts at weekly meetings and overnight trips away from home. The Boy Scouts' purpose is to build qualities of character in young boys, and to inculcate in them specific moral values to which the Scouts and their parents have chosen to subscribe.

This case presents issues of vital importance to the Boy Scouts and to other membership associations organized for the purpose of promoting and inculcating particular values and beliefs. Crucial to the ability of these groups to maintain their identity and to promote their purposes is their control over membership policies. Yet those membership policies are under increasing attack through application of state "public accommodations" laws like the one in Minnesota. Similar statutes in California and Connecticut have already been held to override the Boy Scouts' membership policies and specifically to prohibit the Boy Scouts from excluding homosexuals or women from certain leadership positions.¹ Many other national organizations have had their membership policies challenged under public accommodations laws. See Motion to Affirm, filed December 1, 1983, at 2-5.

¹See *Curran v. Mt. Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *hearing denied* (Cal. January 6, 1984), *appeal pending*, No. 83-1513 (U.S., filed March 14, 1984); *Pollard v. Quinnipiac Council, Boy Scouts of America*, PA-SEX-37-3 (Conn. Comm. on Human Rights and Opportunities) (decision of hearing examiner, January 4, 1984), *petition for review filed* (Conn. Super. Ct. January 19, 1984).

The appellants and their *amici* are pressing this Court to adopt a stunted concept of the nature and scope of associational freedom. This case thus provides the Court with an opportunity to reaffirm the constitutional protections afforded to membership organizations like the Boy Scouts and thereby to protect them from future legal attacks that threaten their ability to operate on a national basis. This brief analyzes the nature of the constitutional freedom of association and the limits that it imposes on State regulation of organizations' membership policies.

SUMMARY OF ARGUMENT

I

The freedom of association is not a mere appendage to the rights enumerated in the First Amendment, but is an independent constitutional value fundamental to our Nation's concept of liberty. Two distinct aspects of individual liberty coalesce under the rubric of "freedom of association": the right to join with others to express and promote religious, philosophical, moral or cultural values or to share in recreational, social or economic interests, and the right to be free from government intrusion in certain activities involving personal relationships.

Both of these rights have roots deep in the political beliefs of our Founding Fathers. Both have been acknowledged throughout our history and differentiate our society from totalitarian regimes. And both have been protected by the decisions of this Court. The Court has defended the right to join with others not simply for political purposes, but for a broad range of activities and interests, whether they are social, professional, political, avocational or religious. Similarly, this Court has protected people's privacy from governmental intrusion on the basis of the physical locations in which the activities occur and the nature of the personal relationship that the government wishes to regulate.

II

To overcome the presumption against intrusion into the freedom of association, the State must demonstrate a sufficiently compelling justification for its action. A court's evaluation of the State's justification must take into account a number of different factors. The predominant issue is whether the association is an enterprise engaged in essentially commercial transactions. The more the organization is designed to serve, preserve, inculcate or promote other values, the greater the protection afforded by the Constitution. Organizations promoting or protecting religious, political or moral values have the greatest protection; the government can intrude upon such groups only if its regulatory actions are justified by the most compelling reasons and are embodied in the most narrowly drawn regulation.

Similarly, the protection of associational privacy will be at its greatest when the organization's functions involve little or no marketplace commercial activity. However, even associations that are engaged in some commercial activities may retain personal privacy protection. The degree of constitutional protection ultimately turns on an analysis of the nature of the relationships and activities at stake.

Several factors must be considered in deciding how compelling the State's interests are. Discharge of core governmental functions such as protection of public health and safety or the implementation of affirmative constitutional policies deserve more deference than assertions of the State's general regulatory powers. Greater force also may be given to supervision of activities traditionally subject to such governmental regulation, or activities in which the government itself has traditionally engaged. A final consideration is the degree to which the State action intrudes into the association's internal affairs as distinguished from its dealings with the public. When an

organization's membership policies are functionally linked to the purposes and goals of the organization, government tampering with those policies will be hardest to justify.

III

The court below properly applied the constitutional test in finding Minnesota's public accommodations statute unconstitutional insofar as it interferes with the Jaycees' membership policies. The court recognized the Jaycees' strong associational interest as a non-commercial organization whose purposes reach the core of First Amendment values. The State action threatens a great intrusion into those interests in the name of eliminating a practice that does not impose a great burden on public commerce, public life, or on the economic opportunities of women. In sum, the court properly concluded that the State had not shouldered its burden to justify its interference with the constitutional rights of the Jaycees' members.

ARGUMENT

I. FREEDOM OF ASSOCIATION HAS AN INDEPENDENT CONSTITUTIONAL STATUS.

Appellants and their *amici* urge the Court to adopt a crimped view of the freedom of association. Under their analysis, associational interests would lack any constitutional dignity except when linked to the promotion of enumerated First Amendment rights. Freedom of association, however, is not merely an appendage to the enumerated rights or simply a mechanism for their exercise. It is a separate human right inherent in the Constitution's plan for limited governmental powers.

Freedom of association is an independent constitutional value fundamental to our concept of liberty. As De Tocqueville wrote 150 years ago,

"The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to be as almost inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." 1 A. De Tocqueville, *DEMOCRACY IN AMERICA* 203 (P. Bradley ed. 1945).

This Court has confirmed De Tocqueville's observation by holding that freedom of association is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960).

Two distinct aspects of individual liberty coalesce under the rubric "freedom of association." First is the person's right to associate with others to nurture or express political, religious, philosophical or cultural values, or simply to pursue economic, social, or recreational interests. *See generally Healy v. James*, 408 U.S. 169, 181 (1972). Second is the right of privacy, the right to be free from intrusion into certain spheres of activity involving personal relationships. Both "the rights of association and of privacy" are "unarticulated rights . . . implicit in enumerated guarantees." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980) (plurality opinion).

A. The Right To Join With Others

The right of people to join together for common purposes has roots deep in the beliefs of our Founding Fathers. Philosophers going back to Aristotle had "advanced the right of association as a protection against a universal conformity" C. Rice, *FREEDOM OF ASSOCIATION* 3 (1962). The seventeenth century British theorists who shaped political thought in colonial America "all

stressed the social nature of man and related to it the concomitant natural rights to associate and assemble." C. Antieau, *RIGHTS OF OUR FATHERS* 82 (1968). John Locke, for example,

"assumes that the individual has a natural and inalienable right to associate. He needs no permission from government to exercise this right; indeed, civil society has an obligation to protect his right and to limit it only on a clear demonstration of necessity. It is this principle which is the foundation of Anglo-American thinking about freedom of association." R. Horn, *GROUPS AND THE CONSTITUTION* 8 (1956).²

The right to join together in voluntary societies, open or secret, lay at the heart of the American experiment.³ Benjamin Franklin, for example, started, among other membership groups, a secret club of artisans and tradesmen, a volunteer fire department, and the American Philosophical Society. See Schlesinger, *supra*, 50 *Amer. Hist. Rev.* at 3. The First Amendment's specific protections presupposed the underlying human right to associate for the pursuit of *any* lawful goal deemed suitable by the participants. Freedom of expression was not limited to the lone voice, and freedom of assembly was simply a specific

² In contrast, Thomas Hobbes, whose belief in the omnipotent state formed the counterpoint to the philosophy of Locke and the Founding Fathers, condemned private associations and believed that the Sovereign could regulate them without restraint. See C. Rice, *supra*, at 6-8; R. Horn, *supra*, at 5-6. Hobbes' hostility toward the freedom of association paralleled the attitude of the Star Chamber, which "regarded as illegal any unlicensed combination of men whose purposes were considered contrary to public policy by the judges, even though the acts involved were neither tortious nor indictable crimes." D. Fellman, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* 3 n.7 (1963).

³ See Schlesinger, *Biography of a Nation of Joiners*, 50 *Am. Hist. Rev.* 1, 5-9 (1944); see also C. Rice, *supra*, at 20-21, 24-26, 28-31; Douglas, *The Right of Association*, 63 *Colum. L. Rev.* 1361, 1373 (1963).

example of the fundamental liberty to join with others, a public manifestation that some believed might need explicit protection. See D. Fellman, *supra*, at 2-10; R. Horn, *supra*, at 17-18.

Building on this rich tradition of associational freedom that had contributed to the creation of the Republic, the nineteenth century saw tremendous growth in membership associations in the United States. Cultural, humanitarian, fraternal and professional societies became core components of American society. Schlesinger, *supra*, 50 Amer. Hist. Rev. at 9-19; M. Abernathy, *The Right of Assembly and Association* 171-73 (2nd ed. 1981). By 1835, De Tocqueville could write, "Americans of all ages, all conditions, and all dispositions, constantly form associations," and could conclude that in "no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America." DEMOCRACY IN AMERICA, *supra*, vol. II at 114 and vol. I at 198.

This growth in associational activities to promote political, philosophical, moral, social and recreational goals did not arise fortuitously; it reflected the autonomous role of the individual under our constitutional system.

"In the United States individualism has meant not the individual's independence of other individuals, but his as well as their independence of governmental restraint. Traditionally, Americans have distrusted collective organization as embodied in government while insisting upon their own untrammelled right to form voluntary associations." A. Schlesinger, *PATHS TO THE PRESENT* 23 (1949).

The need for associational freedom has grown as the institutions which control our society, including government, have grown:

"Freedom of association has always been a vital feature of American society. In modern times it has assumed even greater importance. More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives." Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1 (1964).

Accordingly, freedom of citizens to associate to preserve and pursue particular interests and values constitutes a pillar of our pluralistic society:

"A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, economic, religious, educational, and political programs are formulated.

* * *

"There is no other course consistent with the Free Society envisioned by the First Amendment. For the views a citizen entertains, the beliefs he harbors, the utterances he makes, the ideology he embraces and the people he associates with are no concern of government. That article of faith marks indeed the main difference between the Free Society which we espouse and the dictatorships both on the Left and on the Right." *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 563, 570 (1963) (Douglas, J., concurring).

The truth of Justice Douglas' observation is borne out by the history of totalitarian regimes. In their attempt to dominate the lives of their citizens, totalitarian governments have been quick to outlaw all associations that do

not conform to the government's orthodoxy. The complete domination by such governments of all groups, particularly youth organizations, has presented the world with many chilling spectacles. Free association serves to counterbalance the pressure to conformity. That is why totalitarian regimes loathe this freedom; it is also the reason why it must be carefully guarded as a vital element of our free society.

In sharp contrast to the constraints that appellants and their *amici* now invite the Court to impose, this Court has repeatedly described, in broad terms, the constitutional foundation of the freedom of association. Indeed, the Court has recognized that joining a particular membership society is itself an expression of a person's support for the society's goals and principles: the First Amendment freedom of expression "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it" *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). As this Court observed in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), it is "beyond debate that freedom to engage in association for the advancement of beliefs and ideas" is protected by the Constitution. *Accord Gibson v. Florida Legislative Investigation Committee*, *supra*, 372 U.S. at 543; *Healy v. James*, *supra*, 408 U.S. at 181.

The Court has steadfastly applied the protection not just to committees devoted to political advocacy, but to virtually all forms of affiliation promoting any lawful goals. Thus, the right to be free of state interference has been applied not only to associations devoted to promoting political causes, *NAACP v. Alabama ex rel. Patterson*, *supra*, *Bates v. City of Little Rock*, 361 U.S. 516 (1960), but also to groups facilitating access to the courts, *In re*

Primus, 436 U.S. 412, 426 (1978), engaging in education, see *University of California Regents v. Bakke*, 438 U.S. 265, 311-12 (1978) (Powell, J., concurring) (discussing *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)), or promoting other economic and legal interests, *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), *Thomas v. Collins*, 323 U.S. 516 (1945). In sum, this Court has concluded that an association is entitled to freedom from governmental intrusion regardless of whether its primary organizing theme is "social," "economic," "professional," "political," "avocational," "religious" or "cultural." *Shelton v. Tucker*, *supra*, 364 U.S. at 488; *NAACP v. Alabama ex rel. Patterson*, *supra*, 357 U.S. at 461; see generally Rice, *The Constitutional Right of Association*, 16 Hastings L. J. 491 (1965); M. Abernathy, *supra*, at 173-195.⁴

An essential ingredient of this right to join with others is the right to define the group's identity and purposes through membership criteria. The constitutional right "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). The exercise of this prerogative to exclude others from the group is as entitled to constitutional autonomy as is the initial decision to form the group. The Court has recognized that the freedom from compelled association is a corollary of the freedom to associate, and thus that the

⁴ It would be unrealistic to follow the suggestion made by the appellants and their *amici* that the Court attempt to draw a bright constitutional line between associations that are avowedly "political" or "advocacy" organizations and those that are not:

"Today, there are many thousands of voluntary, non-profit associations, of all sorts and purposes. In one way or another, each of these is actually or potentially a pressure group. That there is a fundamental right to form and join them cannot be questioned." Rice, *supra*, 16 Hastings L.J. at 501.

First Amendment protects citizens in exercising their choice either "to associate or not to associate with whom they please." *Minnesota State Board for Community Colleges v. Knight*, ___ U.S. ___, ___, 52 U.S.L.W. 4204, 4209 (February 21, 1984). As the Court explained in *Gilmore v. Montgomery*, 417 U.S. 556, 575 (1974), quoting Justice Douglas' opinion in *Moose Lodge No. 102 v. Irvis*, 407 U.S. 163, 179-80 (1972), "Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires."

The most common reason why people organize themselves into groups is to share and promote common interests and beliefs. Thus, the group's view of common interests or beliefs will determine a person's eligibility for membership in the group. Potentially exclusive factors such as a person's political beliefs, religion, race, national origin, employment experience, native tongue, military service, genealogy, age or sex may constitute the binding common interest that brings individuals together. Insistence on undiluted adherence to a particular goal, value or characteristic thus gives the organization its cohesiveness, its very reason for being. Organization on the basis of such exclusive criteria facilitates the effective representation and pursuit of the particular association's own theme. It also promotes the pluralism of society by allowing diverse groups to maintain their identity and to promote their own values. See *Developments in the Law: Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 983, 987-88 (1963); A. Westin, *PRIVACY AND FREEDOM* 42 (1967); R. Horn, *supra*, at 153-55; M. Abernathy, *supra*, at 239-44.

B. The Right To Privacy

The right to privacy in conducting one's personal life and personal relationships also has roots deep in our legal traditions. While the constitutionally protected interests

were not often discussed in terms of "privacy" before this century, it has long been considered fundamental to personal liberty that some realms are protected from government intrusion. Any notion that the right to privacy is a "modern" creation is "simply bad history and bad law." A. Westin, *supra*, at 337; *see id.* at 330-337. William Pitt eloquently voiced this principle in 1766:

"The poorest man, may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." (*Quoted in* T. Cooley, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 365 n.4 (5th ed. 1883).)

This famous declaration expressed the abiding principle, long recognized by this Court, that government should respect "the sanctity of a man's home, and the privacies of his life." *ICC v. Brimson*, 154 U.S. 447, 479 (1894). This Court has repeatedly protected the integrity of places, like the home, where people can enjoy personal privacy. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, *supra*, 381 U.S. at 485-86. Two constitutional amendments, the Third and Fourth, expressly protect the privacy of a person's home or other temporary sanctuary against physical intrusion by the government. Thus, government control of the membership policies of associations that conduct their activities in private homes and other similarly intimate settings would directly threaten this freedom from government intrusion.

The protection of privacy, however, extends beyond mere physical location. Justice Brandeis elegantly expressed this principle:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *quoted with approval in Stanley v. Georgia, supra*, 394 U.S. at 564.

This recognition of a broad zone of personal privacy protected from government intrusion distinguishes our constitutional government from tyrannical regimes. This protection, like the freedom to join with others to promote personal beliefs, is one of the first rights to disappear under totalitarianism.

"This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control." Emerson, *Nine Justices in Search of a Doctrine*, in *THE RIGHT TO PRIVACY: A SYMPOSIUM ON THE IMPLICATIONS OF GRISWOLD V. CONNECTICUT* 33 (1971).

The Due Process Clause of the Fifth Amendment is one expression of the general concept that government is limited in how it may deal with its citizens. *See also Katz v. United States*, 389 U.S. 347, 351-52 (1967) (Fourth Amendment protects "people, not places," even in areas accessible to the public). However, if "the fourth and fifth amendments are deemed to exhaust the field of constitutional protection for privacy, then it is a rather narrow field and one unbefitting the concept of privacy as the preeminent right of civilized men." Dixon, *The Griswold Penumbra*, in *THE RIGHT TO PRIVACY: A SYMPOSIUM*, *supra*, at 5. The First Amendment, in its protection of freedom of thought, conscience and expression, and the "reserved powers" clause of the Ninth Amendment, reflect this pervasive constitutional postulate that some aspects of human life are beyond the regulatory zeal of the State. As a consequence of this principle, the Court has invalidated governmental efforts to regulate various private, intimate relationships, such as those between husband and wife, parent and child, and woman and physician.⁵

Protection of a broad zone of *associational* privacy is one aspect of this constitutionally protected autonomy in certain private spheres.

"Group privacy is an extension of individual privacy. The interest protected by group privacy is the desire and need of people to come together, to exchange information, share feelings, make plans and act in concert to attain their objectives. . . . Thus, group privacy protects people's outer space rather than their inner

⁵ *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Loving v. Virginia*, 388 U.S. 1 (1967); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639 (1974); *Smith v. Organization of Foster Families*, 431 U.S. 816, 842-43 (1977); *see generally Roe v. Wade*, 410 U.S. 113, 152-53 (1973); L. Tribe, *AMERICAN CONSTITUTIONAL LAW*, § 15-20 (1978).

space, their gregarious nature rather than their desire for complete seclusion." E. Bloustein, *INDIVIDUAL AND GROUP PRIVACY* 125 (1978).

As another commentator has noted, protection of such privacy is critical to the preservation of the individual's freedom to select his or her intimate associates:

"In a free society . . . it should be the right of every citizen to choose for himself those other persons to whom he wishes to relate in a close, intimate, and continuing way. If he is to enjoy these relationships, he must be allowed the same privacy among his friends that he enjoys within his family." Note, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 Harv. C.R.-C.L. L. Rev. 460, 466 (1970).

Associational privacy is not simply an extension of individual autonomy. The protection of group privacy is itself central to our concept of liberty. "Organizational privacy is needed if groups are to play the role of independent and responsible agents that is assigned to them in democratic societies." A. Westin, *supra*, at 42. As Professor Tribe has put it, if the government may use its power to reach into any relationship between persons, then there is no defense "against the combined tyranny of the state and [the individual's] own alienation." L. Tribe, *supra*, at 988.

II. THE STATE'S ABILITY TO DEMONSTRATE AN ADEQUATELY COMPELLING BASIS FOR INTERFERING WITH THE FREEDOM OF ASSOCIATION DEPENDS UPON THE NATURE OF THE ASSOCIATIONAL INTEREST AT STAKE AND THE NATURE OF THE GOVERNMENT REGULATION.

The Court has insisted that any attempt by the State to override First Amendment rights requires the State to

prove that the public purpose sought to be achieved is not only legitimate, but "compelling," and that it cannot be achieved without impinging upon constitutional rights. See, e.g., *United States v. Lee*, 455 U.S. 252, 256-61 (1982); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Healy v. James*, *supra*, 408 U.S. at 184. In assessing the State's justification for its intrusion, the courts should exhibit an attitude of skepticism, for as Justice Brandeis cautioned in *Olmstead*, *supra*, 277 U.S. at 479, "experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." That caution applies with special force where, as here, the State proposes to elevate the non-constitutional interests of one class of citizens over the constitutionally protected right of the individual members of a specific association to adopt and enforce their own membership criteria.

A workable test for determining whether a State interest is compelling must be sensitive to the broad spectrum of goals that lead people to form associations. It must be able to adjust for the wide range of concerted activities in which members of associations engage. It must take into account the varying degrees of intimacy in associational activities, both in terms of the location of the activities and the nature of the relationships. Whether the government's need to intrude is sufficiently compelling will also turn on the nature of the public purpose to be served by the proposed restriction and the degree of precision used in invading the constitutionally protected interest. The predominant issue affecting both the degree of constitutional protection and the strength of the government's interest is whether the association is involved in an essentially commercial enterprise.

A. Is The Primary Principle Or Goal Animating The Association Commercial?

The decisions of this Court demonstrate that an organization's primary purpose will affect the strength of its constitutional protection from government interference. An association formed by co-religionists to support their common faith appears to be entitled to the most complete protection, because it presents the most extreme combination of protected associational purpose and absence of legitimate regulatory interest.⁶ Organizations designed to serve and nurture political ideals or moral values would appear to stand next to religious groups on the protected end of the spectrum.⁷ If an organization requires its members to subscribe or swear to an oath, law or other set of moral, religious or political principles, its membership determinations are at the core of First Amendment protection. The State would have to demonstrate an extraordinarily compelling public interest in order to justify any intrusion. *E.g.*, *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, *supra*, 364 U.S. at 488. The same test would apply to a group that combines several of these qualities, such as the Boy Scouts, which seeks to instill and promote moral, religious, cultural and social values. See Jurisdictional Statement, in *Mount Diablo Council of the Boy Scouts of America v. Curran*, No. 83-1513 (U.S., filed March 14, 1984).

⁶ See, *e.g.*, *Larson v. Valente*, 456 U.S. 228, 246 (1982); *United States v. Lee*, *supra*, 455 U.S. at 257-58; *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979); *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 447-52 (1969).

⁷ See, *e.g.*, *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *Democratic Party v. Wisconsin ex rel. La Follette*, *supra*; *In re Primus*, *supra*; *NAACP v. Alabama ex rel. Patterson*, *supra*.

When an organization's primary purpose is to engage in commercial transactions, the level of constitutional protection is weaker, and the State's traditional interest in regulating the organization's affairs is greater. Commercial activities occupy a "subordinate position in the scale of First Amendment values. . . ." *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978).⁸

B. Is The Interest In Associational Privacy Limited By The Essentially Commercial Nature Of The Association?

The inquiry into the organization's purposes is only part of the analysis. Considerations such as the intimacy of the activity, the surroundings in which the activities take place, and the contacts involved in the activities all will affect the degree of protection that the right to privacy affords to the associational activities. "It is fair to say that the strength of the privacy interest will depend to some extent upon the type of social associational relationship involved and to some extent upon the conduct regulated within that relationship." Note, *Discrimination in Private Social Clubs: Freedom of Association and Right of Privacy*, 1970 Duke L.J. 1181, 1212. "For example, the marriage relationship is entitled to greater privacy protection than the relationship of two people sitting next to one another on a bus." *Id.*

Again, the principal quality separating highly protected activities from activities that have a lesser claim to constitutional protection is the commercial or economic nature of the association's functions. In other words, how close are the activities of the group to things that one

⁸ See *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Garcia v. Texas State Board of Medical Examiners*, 384 F. Supp. 434 (W.D. Tex. 1974) (three-judge court) (*per curiam*), *aff'd mem.*, 421 U.S. 995 (1975); see generally *Pittsburgh Press Co. v. Pittsburgh Commission On Human Relations*, 413 U.S. 376 (1973) (regulation of commercial speech).

normally does with friends, at home, or otherwise away from the prying eye of the State?

While "it is the constitutional right of every person to close his home or club to any person or to choose his social intimates . . . solely on the basis of personal prejudice . . .," *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring), the State undoubtedly may require equal access or service where the primary purpose of the group is to engage in commercial transactions. As Professor Emerson has suggested, the "right of the government to compel personal associations" should be "framed in terms of drawing the line between the public and private sectors of our common life." Emerson, *supra*, 74 Yale L.J. at 20.

For example, the government may not tell a citizen that he must open his house to everyone simply because he invites 10 friends every week to swim in his pool or to drink at his bar. Even if the friends must help maintain the pool or bring the liquor as a condition of being invited, the government may not intervene to require that he also welcome into the group a person or class favored by the State. If the pool is on a separate lot that the citizen and his friends bought together, or if the drinking "group" meets at a room rented for the occasion, the right of privacy still may completely protect the activity from governmental attempts to dictate the invitation list.

Of course, at some point the privacy interests at stake will diminish as the group activities take on a more commercial quality. In an intermediate zone may be an ostensibly private membership club where "the essence of membership is essentially the exchange of money for goods, services, or the use of facilities . . ." Note, *supra*, 1970 Duke L.J. at 1220. In that case, the propriety of government intrusion may turn on other factors, such as characteristics that would demonstrate whether the relationships of members are still of an intimate or

personal nature despite the market-like quality of the club's provision of services. "Members of genuinely private clubs," even when they are devoted to recreational or social purposes, "have a substantial privacy interest with respect to membership practices." *Cornelius v. The Benevolent Protective Order of the Elks*, 382 F. Supp. 1182, 1202 (D. Conn. 1974). If the "members have genuinely chosen each other as social intimates, the club functions as an extension of their homes." *Id.* In applying the "private club" exemption in Title II of the Civil Rights Act, 42 U.S.C. § 2000a(e), factors such as selectivity in membership, extent of use of facilities by non-members, history of the organization, degree of control over the organization exercised by members, and existence of a profit motive have all been considered in analyzing the privacy interest at stake.⁹ The same type of inquiry should guide constitutional analysis.

The privacy interest may decline virtually to extinction in the case of the large community pool, open to all persons, with little in the way of intimate membership interaction beyond simultaneous physical presence. See *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973); see also *Nesmith v. Young Men's Christian Association*, *supra*. Similar too would be the "club" that serves liquor to virtually all who wish to "join," with little or no membership involvement in the governance of the "club." See *Wright v. The Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970). Also of telling importance is evidence that the private form that the organization takes is merely a subterfuge designed to avoid the impact of desegregation laws. See, e.g., *id.*; *United States v. Slidell*

⁹ See *Daniel v. Paul*, 395 U.S. 298 (1969); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1336 (2nd Cir. 1974); *Smith v. Young Men's Christian Association*, 462 F.2d 634, 648 (5th Cir. 1972); *Nesmith v. Young Men's Christian Association*, 397 F.2d 96, 101-102 (4th Cir. 1968); see also *Quijano v. University Federal Credit Union*, 617 F.2d 129 (5th Cir. 1980) (private club exception to Title VII).

Youth Football Association, 387 F. Supp. 474 (E.D. La. 1974). In those instances, there are virtually no close personal relationships that call for the protective shield of constitutional privacy. See also *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Daniel v. Paul*, *supra*; *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 311-13 (4th Cir. 1980).

Personal privacy interests may exist even in some commercial activities, however, and this recognition has led Congress to exempt dining clubs, employers with just a few employees, and rentals of rooms in private homes from a variety of federal bans on discrimination. See 42 U.S.C. §§ 2000a(e), 2000e(b), 2000e-1, 3603, 3607. The degree of constitutional protection for privacy ultimately turns on an analysis of the nature of the relationships and personal interactions at stake.

C. Are The Government's Interests Sufficiently Compelling?

In the final analysis, the State bears the burden of showing that its reasons for seeking to displace the constitutional protection are adequately compelling. Several factors must be analyzed to determine if the State's justifications for its actions are compelling enough to overcome the constitutional interest at stake. One consideration is the relationship of the State's specific goal to a proper governmental function. A State's showing that its goal involves a core governmental function, such as the protection of public safety against imminent threat to human life, would weigh heavily in the balance. So too could a showing that the State is pursuing some other affirmative constitutional policy, such as the prohibition of racial segregation and the elimination of "badges of slavery" in American society, a policy reflected in three constitutional amendments.¹⁰

¹⁰ See *Bob Jones University v. United States*, _____ U.S. _____, 103 S. Ct. 2017 (1983); *Runyon v. McCrary*, 427 U.S. 160 (1976); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120-22 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).

Other goals that merely represent exercises of the State's residual power carry less weight. The invocation of a generalized governmental interest will rarely be sufficient to overcome specific constitutional protections. If there is to be any vitality to the constitutional rights that the State seeks to displace, the assertion of an unfocused goal of ending non-racial "discrimination," just like a stated desire to prevent the "evils that are thought to inhere generally in solicitation by lawyers of prospective clients," *In re Primus*, *supra*, 436 U.S. at 432, cannot carry much weight in and of itself. *See also Cousins v. Wigoda*, 419 U.S. 477, 489-91 (1975) (State's interest in assuring the "integrity" of the electoral process is not "compelling" in context of election to nominate delegates to political party's national convention). Instead, the courts must assess the propriety and weight of the State's *particular* regulatory interest in overriding the specific rights at issue. *Id.*¹¹

The Court must consider the nature of the activity being regulated. If the State's goal is to be served by imposing restrictions on affairs that are traditionally subject to government supervision, such as employment in the

¹¹ Despite the attempts in various briefs of *amici* supporting appellants to suggest otherwise, this Court has never said that a State's general interest in "ending discrimination" is compelling in the sense that it is sufficient to overcome all constitutional interests. The decision in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982), simply stated that a State's interest in preventing discrimination against its citizens, particularly when they are members of an ethnic minority, gives the State standing to sue on their behalf. The Court's sex discrimination cases, *Orr v. Orr*, 440 U.S. 268 (1979), *Craig v. Boren*, 429 U.S. 190 (1976), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), all concerned the degree of scrutiny to be applied when the government differentiates on the basis of sex, and suggest that distinctions based on sex are not as invidious as are classifications based on race or ethnic origin. In any event, those cases do not address the analytically distinct question of when the State may interfere with the freedom of association in the name of eradicating all non-governmental "discrimination" among different groups of people.

commercial marketplace, it may deserve greater deference. See *Ohralik v. Ohio State Bar Association*, *supra*, 436 U.S. at 460-62. The presence of an established regulatory role for the State implies diminished constitutional autonomy for the persons involved in those activities. See generally E. Bloustein, *supra*, at 140-41 (government regulation of business organizations under Anglo-Saxon law dates back to the 14th century). Innkeepers and the persons who manage the facilities of commerce have long been subject to government's historic interest in protecting a fair, orderly marketplace. Common carriers can lay little claim to strong constitutional protection when they hold themselves open to provide aid and comfort for hire on the public highways. Similarly, their customers can hardly be heard to claim that open access to those facilities intrudes into intimate associations. As Justice Douglas aptly stated, one "who of necessity rides buses and streetcars does not have the freedom that John Muir and Walt Whitman extolled." *International Association of Machinists v. Street*, 367 U.S. 740, 775 (1961) (concurring opinion).

The government's interest in regulating such commercial enterprises may grow with the increase in the organization's ability to control access to basic goods, services, or jobs. The propriety of governmental regulation under such circumstances is well established, dating back to the formation and regulation of trade guilds. This predominant public interest was reflected in the common law obligation of innkeepers and common carriers, who often provided the only lodging or transportation on a stretch of highway, to serve all customers, even though other businesses could refuse service at will. See Note, *Public Accommodations Laws and the Private Club*, 54 Geo. L.J. 915 (1966). Today, that same concern constrains the autonomy of labor unions, which often control

access to jobs, and justifies an obligation to open their membership roles on a nondiscriminatory basis.¹²

By contrast, the State's interest is far weaker when striking out at restrictions that present relatively minor impediments to a person's desire for economic advancement or social recognition. When the State is able to show no more than that *one* of many possible routes to a particular objective *may* be obstructed, its interest in forcing abandonment of that limitation can not be compelling.¹³

A final consideration is the degree to which the State has designed its regulation so as to minimize its intrusion into the group's internal affairs. If the regulation affects only the group's ancillary activities rather than its central purposes and nature, the interest behind the State's action need not be as strong. For example, a State would be justified in regulating admission into a restaurant run by

¹² See, e.g., *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945); *United States v. International Longshoremen's Association*, 460 F.2d 497, 501 (4th Cir.), cert. denied, 409 U.S. 1007 (1972); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 457 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972); see also *Developments in the Law*, supra, 76 Harv. L. Rev. at 993-94.

¹³ Appellants and their *amici* compare this analysis to the discredited concept of "separate but equal," which supported racially segregated public facilities. That doctrine, however, bore on the right of the government to discriminate against its own citizens. The issue here is whether the government's interest in taking regulatory action is sufficient to justify interference with the constitutional freedom of its citizens to choose their own associates. It is perfectly appropriate in the present context to consider the necessity of the government's intrusion and the absence of substantial harm to others if the associational rights are respected.

Furthermore, to argue that a State has a compelling interest in eliminating discrimination in "public accommodations" begs the question. The real question is: when has the State overstepped the limits of its power by defining "public accommodations" so broadly as to interfere impermissibly with the freedom of association. The issue cannot be avoided by assuming the conclusion. Yet, that is what the appellants and the *amici* do when they argue that, because the Jaycees was found to be a "public accommodation" by the Minnesota courts, the State must have a compelling interest in regulating the group's membership policies.

the NAACP, but the NAACP's ownership of the restaurant would not justify regulation of the organization's membership policies. Similarly, State intrusion into the employment policies of the American Jewish Congress might be permissible, but an attempt to regulate the membership or internal affairs of the organization itself would not be entitled to equal deference. *See generally Fesel v. Masonic Home of Delaware, Inc.*, 428 F. Supp. 573 (D. Del. 1977), *aff'd mem.*, 591 F.2d 1334 (3rd Cir. 1979) (distinguishing, for purposes of applying the "private club" exception to Title VII of the 1964 Civil Rights Act, between the Masons organization itself and a nursing home run by the Masons).

When an association's membership criteria are functionally linked to the purposes and goals of the organization, government tampering with those criteria is most intrusive. As a consequence, the State's justification for overriding a basic criterion for affiliation would have to be weightier than for superseding some merely peripheral policy. *See Developments in the Law, supra*, 76 Harv. L. Rev. at 991. For example, the government would have to demonstrate a powerful interest in order to justify a requirement that a "singles" discussion group admit married people. By contrast, the government's burden would be lower if it simply proposed to outlaw "discrimination" on the basis of "marital status" in institutions of higher education.¹⁴

¹⁴ Different considerations may apply if the issue is not State regulation of membership policies, but rather the withdrawal of specific government benefits from organizations that discriminate, at least where the discrimination is racial. *See Bob Jones University v. United States, supra*; *Norwood v. Harrison*, 413 U.S. 455 (1973); *see also Evans v. Newton*, 382 U.S. 296 (1966) (park retained its public character despite formal transfer to private trustees, and hence remained subject to the Fourteenth Amendment's regulation of "State action"); *Sigma Chi Fraternity v. Regents of the University of Colorado*, 258 F. Supp. 515, 527 (D. Colo. 1966) (eliminating racial discrimination in fraternities at State universities "constituted implementation of the substantive rights guaranteed by the Fourteenth Amendment").

When there is difficulty in applying this test, the State's desire to dictate a person's choice of associates must yield to a presumption in favor of protecting the interests of associational freedom and privacy. *See* pp. 16-17, *supra*. Any doubts about the propriety of governmental control of associational relationships should be resolved in favor of freedom rather than regulation.

III. THE DECISION BELOW IS CORRECT UNDER THE PROPER TEST.

The court below correctly applied the constitutional test. The court understood that the validity the State's intrusion into the right of association could

"be determined only after a careful analysis of the extent and nature of the abridgement, the state interest asserted to justify the abridgement, the extent to which this interest will be impaired if the abridgement is set aside by the courts, and the extent to which this interest can be vindicated in less intrusive ways." 709 F.2d at 1570-71.

The court began by recognizing that the members of the Jaycees have a strong associational interest at stake. The Jaycees is not primarily a business, but is an association of like-minded people devoted to advancement of particular beliefs and purposes beyond the merely commercial. The organization was formed to serve educational and charitable purposes, and has adopted as its creed a specific set of religious, moral, economic and political beliefs. Throughout its history, the Jaycees has sponsored a wide varying of charitable and educational programs. *See* Motion to Affirm, filed December 1, 1983, at 6-8.

The Jaycees also has adopted specific programs to promote its position on national issues and publishes a magazine which includes articles addressed to public issues. In addition, the organization has many projects on

the national and local levels addressed to our Nation's most pressing social and political problems. *See id.* at 8-10. The Court of Appeals thus properly emphasized that, as an integral part of the organization's functions, the Jaycees engages in some activities that "fall within the narrowest view of First Amendment freedom of association," including the discussion of issues of public policy and the adoption and communication of formal positions on those issues. 709 F.2d at 1569.¹⁵

On the other side of the inquiry, the court found that Minnesota's interference with the Jaycees' membership policy threatens a great intrusion into the members' associational interests: "If the statute is upheld, the basic purpose of the Jaycees will change." 709 F.2d at 1571. Moreover, while the State's goal of clearing "the channels of commerce of the irrelevancy of sex" may be a public goal "of first magnitude," the issue is whether it is "'compelling' enough" to justify the proposed intrusion; that question requires "a more particularized analysis" than the statute can withstand. 709 F.2d at 1572 (emphasis in original).

The court also recognized the tenuous link between the State's announced goal and the alteration of the Jaycees' membership standards. Although the State may outlaw sex discrimination in the sale of "goods and

¹⁵ The court also considered privacy-related interests. While acknowledging that the Jaycees is not a "small or intimate" group, the court did recognize that a certain selectivity is involved in membership: the Jaycees is not "a cross-section of the community, even of the young male community." 709 F.2d at 1572. Of course, an organization does not forfeit constitutional protection simply because it has gained a large number of adherents. *See, e.g. NAACP v. Button, supra; NAACP v. Alabama ex rel. Patterson, supra.*

The Court below also noted that the Jaycees does not hold "itself out as willing to sell its services to any member of the public." 709 F.2d at 1575. The court stated explicitly, however, that its decision "turned more" on the right to join with others to promote and instill beliefs, ideas and creeds "than on notions of privacy or intimacy." *Id.*

services" to the public, whether by the Jaycees or anyone else, 709 F.2d at 1573, maintenance of a gender-based policy governing full membership in the Jaycees imposes no great burden on public commerce or public life. The court carefully acknowledged that, "if the record showed that membership in the Jaycees was the only practicable way for a woman to advance herself in business or professional life, a different sort of weighing would have to take place, and such a statute might be upheld." *Id.* State intrusion into the Jaycees' membership, however, simply does not promise to have an important impact on the economic opportunities of women.

On balance, then, the court below properly concluded that the State had not shouldered its burden:

"Once a serious incursion on a First Amendment right of association is shown, the normal presumption of constitutional validity is reversed. The state must show that its interference with the claimed right is clearly justified. We are not persuaded that the required showing has been made here, and we therefore hold that the application of the state public-accommodations law to the Jaycees' membership policies is, in the circumstances of this case, invalid under the First and Fourteenth Amendments." 709 F.2d at 1576.

In reviewing the State's invitation to this Court to subordinate the constitutional interests of the members of the Jaycees to the alluring goal of combatting "discrimination," it is worth recalling the skeptically wise question attributed to Sir Thomas More and quoted by the Court in *TVA v. Hill*, 437 U.S. 153, 195 (1978):

"What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide . . . , the laws all being flat?"

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

PHILIP A. LACOVARA
(Counsel of Record)

Of Counsel:
DAVID K. PARK
General Counsel

MALCOLM E. WHEELER
GEORGE A. DAVIDSON
GEOFFREY F. ARONOW

BOY SCOUTS OF AMERICA
Irving, Texas

HUGHES HUBBARD & REED
Washington, D.C.

*Attorneys for the
Boy Scouts of America*

March 1984

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ER L STEVENS
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IN THE

Supreme Court of the United States

October Term, 1983

IRENE GOMEZ-BETHKE, Commissioner, Minnesota Department
of Human Rights; HUBERT H. HUMPHREY, III, Attorney General
of the State of Minnesota; and GEORGE A. BECK, Hearing
Examiner of the State of Minnesota,

Appellants,

against

THE UNITED STATES JAYCEES, a non-profit Missouri
Corporation, on behalf of itself and its qualified members,

Appellee.

**On Appeal from the United States Court of Appeals
for the Eighth Circuit**

**AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK,
JOINED BY THE STATE OF CALIFORNIA
IN SUPPORT OF REVERSAL**

ROBERT ABRAMS
Attorney General of the
State of New York
Amicus Curiae

LAWRENCE S. KAHN
Counsel of Record
Deputy Bureau Chief
Civil Rights Bureau
Assistant Attorney General
Suite 45-08
Two World Trade Center
New York, New York 10047
(212) 488-7514

ROSEMARIE RHODES
Bureau Chief,
Civil Rights Bureau
Assistant Attorney General

SHELLEY B. MAYER
KIM E. GREENE
Assistant Attorneys General
Of Counsel

(List of Additional Counsel on Inside Cover)

JOHN K. VAN DE KAMP
Attorney General of the
State of California
Amicus Curiae
6000 State Building
350 McAllister Street
San Francisco, California 94102
(415) 557-3991

ANDREA SHERIDAN ORDIN
Chief Assistant
Attorney General

MARIAN M. JOHNSTON
Deputy Attorney General

TABLE OF CONTENTS

	PAGE
Interest of <i>Amici Curiae</i>	1
Statement of the Case	3
Summary of Argument	3
Argument	
Point I—The First Amendment Does Not Guarantee the Jaycees the Right to Discriminate Against Membership Applicants on the Basis of Sex	4
A. The Constitutional Rights of the Jaycees Are Not Abridged by Application of Minnesota's Law Barring Discrimination Based on Sex in Places of Public Accommodation	6
B. If Any Constitutional Rights of the Jaycees Are Infringed, the State Has a Compelling Interest Justifying Such Abridgement	13
Point II—The Minnesota Public Accommodations Law, as Interpreted by the Minnesota Supreme Court, Is Not Unconstitutionally Vague	16
Conclusion	19

TABLE OF AUTHORITIES

	PAGE
Cases:	
Batavia Lodge v. New York State Division of Human Rights, 35 N.Y. 2d 143, 359 N.Y.S. 2d 25, 316 N.E. 2d 318 (1974)	3
Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952)	18
Buckley v. Valeo, 424 U.S. 1 (1976)	10
Castle Hill Beach Club, Inc. v. Arbury, 2 N.Y. 2d 596, 162 N.Y.S. 2d 1, 142 N.E. 2d 186 (1957)	3
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	17
Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974)	11
Cousins v. Wigoda, 419 U.S. 477 (1975)	8
Craig v. Boren, 429 U.S. 190 (1976)	14
Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983)	3
Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952)	12
Frontiero v. Richardson, 411 U.S. 677 (1973)	14
Grayned v. City of Rockford, 408 U.S. 104 (1972)	17
Griswold v. Connecticut, 381 U.S. 479 (1965)	8
Healy v. James, 408 U.S. 169 (1972)	6, 8
In re Cox, 3 Cal. 3d 205, 90 Cal. Rptr. 24, 474 P. 2d 992 (1970)	2
Konigsberg v. State Bar, 366 U.S. 36 (1961)	15
NAACP v. Alabama, 357 U.S. 449 (1958)	15
NAACP v. Button, 371 U.S. 415 (1963)	8

	PAGE
<i>Nebbia v. New York</i> , 291 U.S. 502 (1934)	12
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973)	4, 7, 8
<i>Orr v. Orr</i> , 440 U.S. 268 (1979)	14
<i>Parker v. Levy</i> , 417 U.S. 733 (1974)	17, 18
<i>Quijano v. University Federal Credit Union</i> , 617 F. 2d 129 (5th Cir. 1980)	17
<i>Railway Mail Ass'n v. Corsi</i> , 326 U.S. 88 (1945)	9
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	4, 7, 8, 9
<i>Snapp v. Puerto Rico</i> , 458 U.S. 592 (1982)	14
<i>Sullivan v. Little Hunting Park, Inc.</i> , 396 U.S. 229 (1969)	4, 7, 11, 17
<i>Tillman v. Wheaton-Haven Recreation Ass'n</i> , 410 U.S. 431 (1973)	4, 7, 11, 12, 17
<i>United Mine Workers v. Illinois State Bar Ass'n</i> , 389 U.S. 217 (1967)	10
<i>United States v. National Dairy Corp.</i> , 372 U.S. 29 (1963)	18
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	15
<i>United States v. Trustees of Fraternal Order of Ea- gles</i> , 472 F. Supp. 1174 (E.D. Wis. 1979)	18
<i>United States Jaycees v. McClure</i> , 305 N.W. 2d 764 (Sup. Ct. Minn. 1981)	<i>passim</i>
<i>United States Jaycees v. McClure</i> , 709 F. 2d 1560 (8th Cir. 1983)	<i>passim</i>
<i>United States Power Squadrons v. State Human Rights Appeal Bd.</i> , 59 N.Y. 2d 401, 465 N.Y.S. 2d 871, 452 N.E. 2d 1199 (1983)	3, 11, 12, 18
<i>Williamson v. Lee Optical Co.</i> , 348 U.S. 483 (1955)	12
<i>Winters v. New York</i> , 333 U.S. 507 (1948)	7

	PAGE
Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970)	18
Wright v. Salisbury Club, Ltd., 632 F. 2d 309 (4th Cir. 1980)	11
Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976)	18
Statutes:	
FEDERAL:	
42 U.S.C. § 2000a <i>et seq.</i>	5
STATE:	
Cal. Stats. 1897, ch. 108, § 1, p. 137	2
New York Civil Rights Law § 40-c(2) (McKinney 1976 and Supp. 1983-1984)	14
New York Executive Law, Article 15 (McKinney 1976) § 290(3)	2, 12, 13
New York Executive Law, Article 15 (McKinney 1976) § 296(2)(a)	14
1909 N.Y. Laws, ch. 14	2
1952 N.Y. Laws, ch. 285, § 6	2
1964 N.Y. Laws, ch. 239	14
1965 N.Y. Laws, ch. 516	2
1971 N.Y. Laws, ch. 1194	2
Unruh Civil Rights Act, Cal. Civil Code § 51 (Cal. Stata. 1959, ch. 1866, § 1, p. 4424)	2
Other Authorities:	
L. Tribe, <i>American Constitutional Law</i> § 12-6 at 594-598 (1978)	15
U.S. Sup. Ct. Rule 36.4	1

IN THE
Supreme Court of the United States
October Term, 1983

IRENE GOMEZ-BETHEKE, Commissioner, Minnesota Department of Human Rights; HUBERT H. HUMPHREY, III, Attorney General of the State of Minnesota; and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,

Appellants,

against

THE UNITED STATES JAYCEES, a non-profit Missouri Corporation, on behalf of itself and its qualified members,

Appellee.

On Appeal from the United States Court of Appeals
for the Eighth Circuit

**AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK,
JOINED BY THE STATE OF CALIFORNIA**

Interest of *Amici Curiae*

The State of New York, by its Attorney General, Robert Abrams, and the State of California, by its Attorney General, John K. Van de Kamp, submit this brief as *amici curiae* pursuant to Supreme Court Rule 36(4).

Amici submit that the ability of women to compete equally with men in the business, professional and civic worlds

is a value of utmost importance within their states.* The systematic exclusion of women from business, professional and community service organizations has been an historical impediment to the full participation of women in our society. The States of New York and California are firmly committed to altering this historical reality by requiring organizations which provide traditional avenues of professional advancement and community involvement to provide equal access to men and women. These organizations, such as the United States Jaycees, provide leadership training, program experience and informal networks which are frequently essential to full participation within our society and to personal and professional growth.

The States of New York and California have aggressively enforced their policies** and laws against discrim-

* New York and California have long prohibited discrimination in places of public accommodation. In 1909, discrimination in public accommodations based on race was made a misdemeanor in New York. 1909 N.Y. Laws, ch. 14. In 1952, New York made discrimination on the basis of race, color, creed or national origin in places of public accommodation an unlawful discriminatory practice. 1952 N.Y. Laws, ch. 285, § 6. Employment discrimination based on sex was made illegal in 1965. 1965 N.Y. Laws, ch. 516. In 1971, New York banned discrimination based on sex in places of public accommodation. 1971 N.Y. Laws, ch. 1194.

In California, discrimination by enterprises affected with a public interest has long been prohibited. The common law prohibition, made statutory in 1897 (Cal. Stats. 1897, ch. 108, § 1, p. 137), is now codified in the Unruh Civil Rts. Act, Civil Code § 51 (Cal. Stats. 1959, ch. 1866, § 1, p. 4420), *In re Cox*, 3 Cal. 3d 205, 212-214, 90 Cal. Rptr. 24, 27-29, 474 P. 2d 992, 995-997 (1970).

** The New York Legislature has declared that:

[T]he state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity . . . not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. N.Y. Exec. Law § 290(3) (McKinney 1976).

ination in places of public accommodation, and believe it necessary to continue doing so. *See, e.g., United States Power Squadrons v. State Human Rights Appeal Bd.*, 59 N.Y. 2d 401, 465 N.Y.S. 2d 871, 452 N.E. 2d 1199 (1983); *Batavia Lodge v. New York State Division of Human Rights*, 35 N.Y. 2d 143, 359 N.Y.S. 2d 25, 316 N.E. 2d 318 (1974); *Castle Hill Beach Club, Inc. v. Arbury*, 2 N.Y. 2d 596, 162 N.Y.S. 2d 1, 142 N.E. 2d 186 (1957); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 731-732, 195 Cal. Rptr. 325 (1983).

The decision of the court below would severely hamper New York, California and other states in their attempts to eradicate discrimination in public accommodations. Unless the decision is reversed, places of public accommodation will be given free license to discriminate solely because they espouse some ideas, the expression of which is protected by the First Amendment. This would effectively defeat New York's and California's efforts to open public accommodations to members of both sexes, and of all races, religions and nationalities.

Statement of the Case

Amici adopt the Statement of the Case as set forth in Appellants' brief.

Summary of Argument

- The United States Constitution does not affirmatively protect a public organization's discriminatory denial of equal membership opportunities to women. No First Amendment associational right attaches to such an organization merely because it expresses some limited political

or ideological positions. *Runyon v. McCrary*, 427 U.S. 160 (1976); *Norwood v. Harrison*, 413 U.S. 455 (1973). Thus, states may constitutionally prohibit such an organization from discriminating against women in its membership policies.

Assuming, *arguendo*, that the Jaycees' freedom to associate is infringed by application of Minnesota's anti-discrimination statutes, the state has a sufficiently compelling interest in ending discrimination to justify that infringement.

Finally, the statute as construed by the Minnesota Supreme Court clearly distinguishes between "public" and "private" clubs and thus is not unconstitutionally void for vagueness. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

ARGUMENT

POINT I

The First Amendment Does Not Guarantee the Jaycees the Right to Discriminate Against Membership Applicants on the Basis of Sex.

The decision of the court below, that Minnesota's anti-discrimination laws cannot constitutionally be applied to the membership policies of the United States Jaycees, rested on the erroneous belief that the ideological and political positions taken by the Jaycees will inevitably change if women are afforded equal membership status within the organization. Although the court agreed that most of the

positions taken by the Jaycees had nothing to do with the sex of its members, the court speculated that the presence of women might cause the Jaycees to adopt different ideological and political viewpoints. The grant of affirmative constitutional protection to discriminatory membership policies of a public organization cannot, however, be based on such mere speculation.

If the decision of the court below is upheld, New York, California and other states (and the federal government*) will be unable to require all places of public accommodation to open their doors equally to men and women. The mere espousal of any political or ideological position, unrelated to the exclusionary membership policies which the state declares unlawful, will immunize organizations and accommodations from application of laws barring discrimination** in public accommodations.

This Court has applied a two-tiered analysis in cases where an unconstitutional limitation on the freedom of association is alleged. First, the Court has examined whether any associational rights have actually been infringed by the conduct in question. If the state's actions have caused no impediment to the exercise of constitutional rights, the inquiry need go no further. If, however, a constitutional right has been limited by the state's actions, the Court must then balance the extent of the interference with

* The holding of the court below would apply with equal force to organizations found not to be "private clubs" and subject to federal law barring racial discrimination in public accommodations. 42 U.S.C. § 2000a *et seq.*

** Racially-discriminatory membership policies, as well as sexually-discriminatory policies, would also be constitutionally protected if the court's opinion is affirmed.

protected rights against the state's interest in abridging such rights. *Healy v. James*, 408 U.S. 169, 181 (1972).

As *amici* will argue, the order of the Hearing Examiner, requiring the Jaycees to accept women as members, does not interfere with the Jaycees' rights under the First Amendment. But even if the rights asserted are of sufficient importance to warrant constitutional protection, the state's interest in this matter is so compelling as to overwhelmingly outweigh any interests of the Jaycees which might be abridged by application of Minnesota's laws against discrimination in public accommodations.

A. The Constitutional Rights of the Jaycees Are Not Abridged by Application of Minnesota's Law Barring Discrimination Based on Sex in Places of Public Accommodation.

After citing cases allegedly supporting an independent constitutional right of association, the court below assessed the Jaycees' activities and determined that "a good deal of what [they do] indisputably comes within the right of association, even as limited to association in pursuance of the specific ends of speech, writing, belief, and assembly for redress of grievances." *United States Jaycees v. McClure*, 709 F. 2d 1560, 1570 (8th Cir. 1983). This finding rested on the court's examination of several of the Jaycees' positions on matters of social or political concern. For example, the Jaycees' creed contains the sentiments that its members believe in "faith in God" and "free enterprise" and believe that "the brotherhood of man transcends the sovereignty of nations." *Jaycees*, 709 F. 2d at 1570. The court then reasoned that because these ideas, and others espoused by the Jaycees, represent certain ideological posi-

tions, the actions of the Jaycees in denying equal membership opportunities to women are constitutionally immune from application and enforcement of Minnesota's law against discrimination in public accommodations.

Amici assert that this holding, which represents a major departure from prior court decisions upholding the constitutionality and application of laws against discrimination,* relies on misguided interpretations of prior holdings of this Court and more accurately reflects disagreement with the finding of the Minnesota Supreme Court that the Jaycees is a "place of public accommodation" under Minnesota law. *United States Jaycees v. McClure*, 305 N.W. 2d 764, 774 (Sup. Ct. Minn. 1981). The decision of the Minnesota Supreme Court is authoritative on the issue. *Winters v. New York*, 333 U.S. 507, 514 (1948).

The cases cited by the court below do not support the proposition that mere espousal of "political" or "ideological" views confers upon a "public business facility", *United States Jaycees v. McClure*, 305 N.W. 2d 764, 768 (Sup. Ct. Minn. 1981), a constitutional immunity from application of state anti-discrimination laws.** The cases cited represent deliberate, case-by-case determinations that constitutional rights were infringed by state actions affecting the exercise

* *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973); *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969).

** Although Minnesota's statute does not expressly provide a statutory exemption for private clubs, "private associations and organizations—for example those that are selective in membership", are unaffected by Minnesota law. *United States Jaycees v. McClure*, 305 N.W. 2d at 768.

of pure First Amendment rights.* They do not create a general "associational" right to be enjoyed by businesses, or by non-private organizations which espouse certain limited "ideological" views, particularly when the substantive content of the views expressed is unrelated to the discrimination which the state seeks to ban.

This Court and lower courts have consistently refused to provide *acts* of discrimination, as opposed to *mere speech*, with constitutional protection. In *Runyon v. McCrary*, 427 U.S. 160 (1976), this Court held that a nursery school's refusal to admit black children violated 42 U.S.C. § 1981, and stated:

[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood v. Harrison*, 413 U.S. 455, "the Constitution . . . places no value on discrimination," *id.*, at 469, and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections." 427 U.S. at 176, *quoting Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973) (emphasis in original).

* *Healy v. James*, 408 U.S. 169 (1972) (holding unconstitutional a blanket bar on recognition of college SDS chapter without evidence of individualized inquiry into chapter's views on disruption); *Cousins v. Wigoda*, 419 U.S. 447 (1975) (upholding right to join political party of one's choice); *NAACP v. Button*, 371 U.S. 415, 431 (1963) (Virginia could not ban NAACP attorneys from "soliciting" cases because constitution protected right to associate for purposes of litigation to attack racial discrimination); *Grissold v. Connecticut*, 381 U.S. 479 (1965) (right of privacy includes right to choose whether to bear children).

The court below distinguished *Runyon* on the grounds that it involved a school available to the public, and not a "private social organization." *Jaycees*, 709 F. 2d at 1575. That distinction, however, simply reflected the court's disagreement with the binding holding of the Minnesota Supreme Court that the Jaycees are *not* a private social organization, but a "public business facility." *United States Jaycees v. McClure*, 305 N.W. 2d at 771. Further, the court below cited to potential changes in the Jaycees "dogma" that might result if women became equal members, but in *Runyon* this Court approved the Court of Appeals' finding that there was "no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma." 427 U.S. 176, *citing* 515 F. 2d at 1087. If the admission of black children to an all-white nursery school would not affect the espousal of racist principles, it is even less likely in this case that the admission of women members would alter the sex-neutral ideology of the Jaycees.

In *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945), this Court rejected the claims of the Railway Mail Association, a labor organization which refused to admit black members because of their race, that its constitutional rights were abridged by a New York law barring racial discrimination by labor organizations:

"Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself enacts." 326 U.S. at 98 (*Frankfurter, J., concurring*).

The cases cited by the court below in support of its extension of the constitutional right of association to the discriminatory membership policies of a public enterprise were based on a showing that the First Amendment activities at stake (*e.g.*, speech, assembly, petition for redress of grievances) were encumbered or restricted by the prohibition or regulation which was challenged as unconstitutional. For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), the court struck down federal laws limiting expenditures "relative to a clearly identified candidate." 424 U.S. at 13 (citations omitted). In declaring part of the law unconstitutional, the Court stated that the monetary limitation "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." 424 U.S. at 22.

Similarly, in *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 218-220 (1967), this Court held that Illinois could not bar the Mine Workers from retaining an attorney to represent its members in Workers' Compensation claims. In so doing, the Court found that the Mine Workers associational rights included the right to provide attorneys to "assist its members in the assertion of their legal rights" since such assertion was intimately connected to their rights of speech, assembly and petition for redress of grievances. *United Mine Workers*, 389 U.S. at 221-22.

The record in this case is devoid of any evidence of a nexus between the membership policies of the Jaycees and the content of the "political" or "ideological" views it espouses. *Jaycees*, 709 F. 2d at 1571. As the court below recognized, most of the views expressed by the Jaycees bear

no relation to the sex of the believer. *Jaycees*, 709 F. 2d at 1571. The support of school prayer, a balanced budget or economic development of Alaska are gender-neutral political opinions which are apparently held with equal strength by the women who are currently associate Jaycees members and by the male members of the Jaycees. There is nothing in the record to support the belief that if the Jaycees admit women as full members, it will become supportive of different political or ideological positions.

If merely supporting such gender-neutral ideas such as "faith in God", "free enterprise", or "brotherhood of man" empowered an entity to maintain discriminatory membership policies because the entity's views "might" change if the policies were not discriminatory, *no* organization would have to comply with anti-discrimination laws. An organization would need only to state its belief in the "brotherhood of man" or the rights of "free men" to immunize itself from the application of such laws.

The constitutional right to discriminate—if it exists at all—is extinguished once an organization is found to be "not private." See *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969); *Wright v. Salisbury Club, Ltd.*, 632 F. 2d 309 (4th Cir. 1980); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1202 (D. Conn. 1974); *United States Power Squadrons v. State Human Rights Appeal Bd.*, 59 N.Y. 2d 401, 411, 465 N.Y.S. 2d 871, 877-878, 452 N.E. 2d 1199, 1205-1206 (1983). Here, the United States Jaycees sells memberships to men without any selectivity. *United States Jaycees v. McClure*, 305 N.W. 2d at 771. The organization's emphasis

is on sales and solicitation of memberships to any and all men, promising them the "advantages" that arise from membership in the Jaycees, including leadership training. 305 N.W. 2d at 779. No membership applicant in Minnesota has ever been rejected. 305 N.W. 2d at 771. The very essence of a "private club"—selectivity in membership—is thus entirely absent. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *United States Power Squadrons v. State Human Rights Appeal Bd.*, 59 N.Y. 2d 401, 465 N.Y.S. 2d 871, 452 N.E. 2d 1199 (1983).

Because no constitutional right is infringed here, the state need only show that its statute bears a rational basis to its undeniably legitimate interest in promoting equality in public accommodations. *Nebbia v. New York*, 291 U.S. 502, 537 (1934); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).^{*} The methods the state has employed to advance its interests in this case are not unreasonable, arbitrary or capricious since they do not restrict, control or determine the Jaycees' activities, but only require that such activities be open to women and men equally. In addition, the means chosen by the Hearing Examiner—enjoining the Jaycees from denying women equal membership status—has a reasonable and substantial relation to the state's articulated interests in assuring equal opportunities for its female citizens. Under the terms of the Hearing Examiner's order, the Jaycees can continue to devote its energies to the development of young men and their interests, as expressed in its Bylaws.

^{*} New York's statute barring discrimination based on sex in places of public accommodation is explicitly an exercise of its police power, and is intended to protect the health and safety of the public. N.Y. Exec. Law § 290(3) (McKinney 1976).

In sum, the Jaycees possess no constitutional protection for their discriminatory membership policies, because their right to espouse their views is not restricted by a requirement that they admit women to full membership.

B. If Any Constitutional Rights of the Jaycees Are Infringed, the State Has a Compelling Interest Justifying Such Abridgement.

Assuming, *arguendo*, that the Jaycees' associational rights are in some manner infringed by application of the Minnesota anti-discrimination laws, that infringement is justified by Minnesota's compelling interest in providing equal opportunity to men and women.

While agreeing that the state's interest in this case—preventing discrimination in public accommodations on the basis of sex “is ‘compelling’ in the general sense of that word,” *Jaycees*, 709 F. 2d at 1572 (citation omitted), the court below held Minnesota's interest was not sufficiently compelling to justify the degree of interference it imposed on the Jaycees. *Jaycees*, 709 F. 2d at 1576.

The court below greatly undervalued the extent of the state's interest in this case. There is no question that states have a “compelling interest in eradicating second-class citizenship in places of public accommodation.” *Jaycees*, 709 F. 2d at 1581 (*Lay*, Chief J., dissenting). The New York Legislature, for example, has found:

“The failure to provide equal opportunity . . . not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state

and its inhabitants.” N.Y. Exec. Law § 290(3) (McKinney 1976).

The interest of Minnesota, New York and California in enacting and aggressively enforcing their Human Rights Laws is based on a social value which is of utmost importance*—allowing female citizens full and equal access to places of accommodation which are open to the public in order to provide women the opportunity to enhance their development as members of the community and to promote equality in general. As this Court recognized in upholding Puerto Rico’s *parens patriae* standing against growers alleged to have discriminated against Puerto Ricans based on their origin:

Just as we have long recognized that a State’s interest in the health and well-being of its residents extend beyond mere physical interests to economic and commercial interests, we recognize a similar state interest in securing residents from the harmful effects of discrimination. This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils. *Snapp v. Puerto Rico*, 458 U.S. 592, 609 (1982).

See also Orr v. Orr, 440 U.S. 268, 279-281 (1979); *Craig v. Boren*, 429 U.S. 190, 198-199 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

* In 1964, New York deemed freedom from discrimination in employment based on sex to be a civil right. 1964 N.Y. Laws, ch. 239. New York law now prohibits any discrimination in civil rights based on sex, N.Y. Civ. Rts. Law § 40-c(2) (McKinney 1976 and Supp. 1983-1984), and makes discrimination based on sex in places of public accommodation an unlawful discriminatory practice. N.Y. Exec. Law § 296(2)(a) (McKinney 1976).

There is hardly a more important area of state concern than furtherance of the opportunities of all citizens to participate in educational, business and civic associations. As noted by the Minnesota Supreme Court, the Jaycees provide exactly such opportunities. "Those holding individual memberships and who become officers in the organization thereby receive *enhanced leadership experience* and enjoy the enhanced privileges and advantages of making contact with others, often *business contacts*." *United States Jaycees v. McClure*, 305 N.W. 2d at 769 (emphasis added). Those women who are currently associate members of the Jaycees are unable to benefit, either personally or professionally, from the significant leadership roles which male members can attain, since they cannot vote on issues or in elections, cannot hold any office and cannot receive any awards in recognition of their work.

In assessing the state's interest when its actions have interfered with First Amendment freedoms, this Court has looked to the *intent* of the state statute to determine if the state's interest is "suppression of free expression". *United States v. O'Brien*, 391 U.S. 367, 377 (1968); L. Tribe, *American Constitutional Law* §12-6, at 594-598 (1978). Here, the state's interest in requiring equal membership opportunities is neither abridgement of any "pure" First Amendment rights, nor deterrence of association. See *Konigsberg v. State Bar*, 366 U.S. 36, 52 (1961); *United States Jaycees v. McClure*, 305 N.W. 2d at 765; *NAACP v. Alabama*, 357 U.S. 449 (1958). The state merely seeks to give women the same rights as men to participate in a "public business." *United States Jaycees v. McClure*, 305 N.W. 2d at 769.

The less intrusive methods suggested by the court below, *Jaycees*, 709 F. 2d at 1573-1574, would only be less effective

means of accomplishing the state's compelling goal of assuring women equal access to places of public accommodation.

The Minnesota fair employment agency's directive that the Jaycees admit women to full membership is the only effective means of advancing the state's compelling interest in providing equal access to public accommodations to members of both sexes.

In sum, if the Jaycees' associational rights are infringed by application of Minnesota's anti-discrimination laws, that infringement is justified by the state's paramount interest in assuring equal opportunity to women and men.

POINT II

The Minnesota Public Accommodations Law, as Interpreted by the Minnesota Supreme Court, Is Not Unconstitutionally Vague.

The Eighth Circuit ruled that the Minnesota public accommodations statute, as interpreted by the Minnesota Supreme Court, is unconstitutionally vague because the state court failed to provide "any discernible standard by which to distinguish 'public' [organizations] from 'private' [ones]." *Jaycees*, 709 F. 2d 1560 at 1577. Ignoring the Minnesota court's analysis of the public/private distinction, the court below instead focused on the state court's statement that the Jaycees was not analogous "to private organizations such as the Kiwanis International Organization." *United States Jaycees v. McClure*, 305 N.W. 2d 764 at 771.

The court below took this dictum regarding the Kiwanis and transformed it into a holding that the organization is private. But the Minnesota court did not so hold. The

Kiwanis was not before the state court and the record concerning the organization was clearly not adequate to reach any conclusion on the Kiwanis' public/private status.*

Where specific standards are provided to guide the application and enforcement of a statute, the statute cannot be found to be void for vagueness. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In its decision, the Minnesota Supreme Court employed a clear and specific standard to distinguish between public and private organizations. The court found that the Jaycees is a public organization because it "encourages continuous recruitment, discourages the use of any selection criteria" and does not limit the size of its membership. 305 N.W. 2d 764 at 771.**

The standard adopted by the Minnesota court, which is based on the exclusivity and selectivity of the organizations' membership practices, is completely consistent with the standards used by this Court and lower federal courts to distinguish between public and private organizations in applying public accommodation and other civil rights statutes. See, e.g., *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) (42 U.S.C. §§ 1981, 1982); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (42 U.S.C. §§ 1981, 1982); *Quijano v. University Federal*

* The limited information in the record about the Kiwanis organization suggests, however, that because of the Kiwanis' restrictions on membership, under the clearly defined standards enunciated by the Minnesota Supreme Court, Kiwanis might well be considered private. The Jaycees have no comparable restrictions. *Jaycees*, 709 F.2d 1560 at 1582 (Lay, Chief J., dissenting).

** As this Court has recognized, an authoritative construction of a statute by a court can make words which might otherwise be vague sufficiently specific to avoid any constitutional infirmity. *Parker v. Levy*, 417 U.S. 733, 752 (1974); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

Credit Union, 617 F.2d 129 (5th Cir. 1980) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b)(2)); *Wright v. Cork Club* 315 F. Supp. 1143 (S.D. Tex. 1970) (Title II, 42 U.S.C. § 2000a(e)); *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174 (E.D. Wis. 1979) (Title II, 42 U.S.C. § 2000a(e)).

The New York Court of Appeals recently employed the same standard to repudiate the contention of the United States Power Squadrons, an all male organization, that it is a private club and therefore exempt from coverage under the New York public accommodations law.

The court stated:

"The essence of a private club is selectivity in its membership. It must have a 'plan or purpose of exclusiveness.' Organizations which routinely accept applicants and place no subjective limits on the number of persons eligible for membership are not private clubs." *United States Power Squadrons v. State Human Rights Appeal Bd.*, 59 N.Y. 2d 401, 412, 465 N.Y.S. 2d 871, 876, 452 N.E. 2d 1199, 1204 (1983) (citations omitted).

This Court has stated repeatedly that a statute is not rendered void for vagueness merely because there may be marginal cases in which the standard may be difficult to apply. *United States v. National Dairy Corp.*, 372 U.S. 29 (1963); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952). Thus, the speculative concern of the court below about the status of the Kiwanis Organization cannot provide the basis for a holding that the Minnesota public accommodations law is unconstitutionally vague.*

* In the absence of any First Amendment violation, Point I, *supra*, the organization lacks standing to assert a claim that the statute is void for vagueness as applied to the Kiwanis. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61-63 (1976); *Parker v. Levy*, 417 U.S. 733, 756 (1974).

The Jaycees do not present a marginal or problematic case. The organization exercises virtually no selectivity in its membership policy, other than unlawful sex discrimination, as is amply demonstrated by the organization's inability to cite a single instance in which a male was rejected for membership. *Jaycees*, 305 N.W. 2d 764, 771. The Minnesota public accommodations law is clearly applicable to the Jaycees.

The Minnesota Supreme Court properly adopted and applied to the Jaycees a widely accepted, specific standard to distinguish between public and private organizations. The standard was not rendered vague by the court's reference, in dictum, to another, entirely different organization not before the court.

Conclusion

For the Foregoing Reasons, the Decision of the Court of Appeals Should Be Reversed.

Dated: New York, New York
February 22, 1984

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Amicus Curiae

LAWRENCE S. KAHN
Counsel of Record
Deputy Bureau Chief
Civil Rights Bureau
Assistant Attorney General
Suite 45-08
Two World Trade Center
New York, New York 10047
(212) 488-7514

ROSEMARIE RHODES
Bureau Chief,
Civil Rights Bureau
Assistant Attorney General

SHELLEY B. MAYER
KIM E. GREENE
Assistant Attorneys General
Of Counsel

(List of Additional Counsel on Next Page)

JOHN K. VAN DE KAMP
Attorney General of the
State of California
Amicus Curiae
6000 State Building
350 McAllister Street
San Francisco, California 94102
(415) 557-3991

ANDREA SHERIDAN ORDIN
Chief Assistant
Attorney General

MARIAN M. JOHNSTON
Deputy Attorney General

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No. 83-724

IN THE
Supreme Court of the United States
October Term, 1983

KATHRYN R. ROBERTS, Acting Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY III, Attorney General
of the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,
Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of
itself and its qualified members,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF FOR
COMMUNITY BUSINESS LEADERS AS
AMICUS CURIAE**

ELDON J. SPENCER, JR.
O'NEILL, BURKE AND
O'NEILL, LTD.

(Counsel of Record)
MICHAEL B. BRAMAN
CHRISTINE L. MEUERS
Business address of above Counsel:
800 Norwest Center
55 East Fifth Street
St. Paul, Minnesota 55101
(612) 227-9505

Dated: February 22, 1984

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

No. 83-724

KATHRYN R. ROBERTS, Acting Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY III, Attorney General
of the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Appellants,

VS.

THE UNITED STATES JAYCEES, a non-profit
Missouri corporation, on behalf of
itself and its qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION BY COMMUNITY BUSINESS LEADERS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Introduction

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, Community Business Leaders respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the appellants in this case.

It should be noted that appellants have consented to such a filing, and their written consent is on file with the Court. However, the United States Jaycees has refused to consent to such a filing. Therefore, this motion is brought.

Identity and Interest of Amicus Curiae

Community Business Leaders is a newly renamed Minnesota nonprofit corporation which prior to January 12, 1984, was called the "Saint Paul Jaycees". On January 12, 1984, the United States Jaycees voted to revoke the Charter of the Saint Paul Jaycees because the Saint Paul Chapter admitted women to full membership status, which meant that women had the right to vote and hold office within the organization. This was contrary to the United States Jaycees By-Laws.

Pursuant to amendments to its Articles of Incorporation, the corporation's name automatically changed to "Community Business Leaders" upon revocation of its Saint Paul Jaycees' Charter.

Community Business Leaders' interest in this case essentially is four-fold:

First, reversal of the court of appeals' decision in this matter would afford Community Business Leaders members the possibility of reaffiliation with the United States Jaycees without violating their principles. Assuming the Jaycees opt to continue operations in Minnesota if this Court reverses the court of appeals and reinstates the order of the District Court for the District of Minnesota, then one of two outcomes could occur: (1) Community Business Leaders would be eligible for either reinstatement of the Saint Paul Jaycee Charter under terms which would allow its women members equal membership privileges; or (2) its members could establish a new Jaycee Chapter or join any new chapter in Saint Paul which may have been established by the time a final decision in this case is issued, in either case with assurance that their charter would not be revoked for providing full membership status for members of both sexes.

Secondly, affirmance would allow Community Business Leaders the possibility of regaining for their organization the name recognition the "Jaycee" name had in the Saint Paul community, recognition that members of Community Business Leaders have helped earn for the organization. Such name recognition is extremely important to the corporation's members because they run various community projects which require both funding from local businesses and community support. These projects are more successfully run and better attended when the "Jaycee" name is associated with the projects, because of the high degree of recognition accorded that name. Examples of these projects include: (1) the annual Children's Shopping Tour, where indigent children are taken shopping to buy Christmas presents for their families, taken to lunch, and offered the opportunity to select Christmas presents for themselves; (2) the Ramsey County Nursing Home Project, a get-together with the elderly at the Ramsey

County Nursing Home; (3) the annual handicapped children's fishing trip; and (4) the Big Brothers and Big Sisters outing to a Minnesota Twins baseball game.

Third, a favorable decision by this Court will allow Community Business Leaders the possibility of resuming use of the Jaycee name to promote membership in its organization. People moving into the Saint Paul community, who seek to become involved in the community, may not know the name of "Community Business Leaders". The "Jaycee" name, on the other hand, has such wide national recognition that people moving into the community from out of state would more easily identify the organization as a place for fulfilling their desire for community involvement.

Community Business Leaders' final interest is that this Court's decision reflect the sentiment of its members and the Saint Paul community. The organization's vote on this matter reflected near-unanimity among both men and women members that women members, who presently comprise approximately 40% of both overall and Board of Directors membership, be allowed to retain their positions and voting privileges. Community support has included newspaper editorials, resolutions by the Saint Paul Chamber of Commerce and the Saint Paul City Council, and direct encouragement from major companies in the Saint Paul area.

Question to be Addressed by this Amicus Curiae

Consistent with its interests indicated above, Community Business Leaders' attached brief *amicus curiae* is devoted to demonstrating: (1) that the court of appeals' decision rejecting Minnesota's attempt to implement a civil right of freedom from discrimination in "public" membership organizations like the Jaycees ignored important record evidence relating to compelling interests of present and former Jaycee members which the state, through its Human Rights Act, seeks to promote; and (2) that the court of appeals' decision failed to take sufficient note of record evidence indicating several unique aspects of the Jaycee organization distinguishing it from other, less commercially oriented private membership organizations.

Community Business Leaders has identified numerous facts contained in the record before this Court which emphasize: (1) the compelling nature of the statutory scheme struck down by the Eighth Circuit Court, as well as (2) the presence of unique characteristics in the Jaycee organization which differentiates it from other types of membership organizations whose more selective membership practices and other characteristics may warrant greater insulation from state anti-discrimination legislation. Certain of these facts were either not noted by Appellants in their lower court brief, or not stressed to the extent Community Business Leaders feels appropriate. Therefore, Community Business Leaders respectfully requests that this Court grant it leave to file its attached brief *amicus curiae* in order to more fully explicate these facts

which are particularly crucial to any constitutional balancing
which this Court may determine is required.

Respectfully submitted,

/s/ ELDON J. SPENCER, JR.

ELDON J. SPENCER, JR.
O'NEILL, BURKE AND
O'NEILL, LTD.

(Counsel of Record)

MICHAEL B. BRAMAN
CHRISTINE L. MEUERS

800 Norwest Center
55 East Fifth Street
St. Paul, Minnesota 55101
(612) 227-9505

VERIFICATION

The factual statements included in the above Statement of
Identity and Interest of Amicus Curiae are true to the best
of my knowledge and belief.

/s/ ANNE FORD NELSON

ANNE FORD NELSON

President, Community Business
Leaders

Subscribed and sworn to before me
this 22nd day of February, 1984.

/s/ MICHAEL B. BRAMAN

Notary Public

TABLE OF CONTENTS

	Page
Motion for Leave to File Brief Amicus Curiae	i
Table of Contents	vi
Table of Authorities	viii
Statement of Facts and Procedural History	1
Summary of Argument	5
Argument	6
I. The State of Minnesota's Purpose in Protecting and Promoting the Civil Rights Of All Its Citi- zens is a Compelling One Which Outweighs Whatever Constitutional Protection Might Otherwise Be Afforded the Associational Rights of the Jaycees	6
A. The Minnesota Human Rights Act Reflects a State Policy Placing High Value on Pro- tecting Citizens from Discrimination on the Basis of Sex	6
B. The State of Minnesota's Interest in Free and Equal Access to Public Accommodations For All Its Citizens is Similar to Interests Which Have Been Recognized As Compell- ing By This Court and Other Courts	8
C. The Minnesota Human Rights Act Promotes and Fosters Such Rights of the State's Citi- zens As Those Of Free Speech and Travel, Long Recognized By This Court As Funda- mental, and Interwoven In This Case With the Specific Statutory Rights Created	13

	Page
II. The Minnesota Supreme Court Relied Upon Identifiable and Accepted Criteria in Determining the Scope of the Public Accommodation Section of Minnesota's Human Rights Act	18
A. The Plain Language and Judicial Interpretation of the Minnesota Human Rights Act Leave No Vagueness as to Whether the Jaycees is a Public Accommodation Under the Act	18
B. Readily Identifiable Criteria are Available to Limit the Scope of the Public Accommodations Section of the Minnesota Human Rights Act to Constitutionally Permissible Applications and Thereby Avoid Potential Overbreadth Concerns	24
III. The Minnesota Human Rights Act Does Not Violate the Fourteenth Amendment's Equal Protection Clause	27
Conclusion	30

TABLE OF AUTHORITIES

	Page
<i>Statutes:</i>	
42 U.S.C. § 3601 (1977)	9
Minn. Stat. Chapter 363 (1982)	2
Minn. Stat. § 363.01 (1982)	3, 18, 25
Minn. Stat. § 363.03 (1982)	2, 28, 29, 30
Minn. Stat. § 363.06 (1982)	7
Minn. Stat. § 363.071 (1982)	13
Minn. Stat. § 363.12 (1982)	7, 8, 18, 28
Minn. Stat. § 363.14 (1982)	7
<i>United States Supreme Court Cases:</i>	
Benton v. Maryland,	
395 U.S. 784 (1969)	14
Boyce Motor Lines, Inc. v. United States,	
342 U.S. 337 (1952)	23
Broadrick v. Oklahoma,	
413 U.S. 601 (1973)	24
Brown v. Board of Education,	
347 U.S. 483 (1954)	9
Buckley v. Valeo,	
424 U.S. 1 (1976)	8
Kent v. Dulles,	
357 U.S. 116 (1958)	14
Mississippi University for Women v. Hogan,	
458 U.S. 718 (1982)	12
Norwood v. Harrison,	
413 U.S. 455 (1973)	9, 10
Palko v. Connecticut,	
302 U.S. 319 (1937)	14

	Page
Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972)	28
Railway Express Agency v. New York, 336 U.S. 106 (1949)	29
Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945)	9, 18
Runyan v. McCrary, 427 U.S. 160 (1976)	9
United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973)	9

Federal Cases:

Barrick Realty, Inc. v. City of Gary, Indiana, 354 F. Supp. 126 (N.D. Ind. 1973), <i>aff'd</i> , 491 F.2d 161 (7th Cir. 1974)	10
United States v. Bob Lawrence Realty, Inc., 313 F. Supp. 870 (N.D. Ga. 1970), 474 F.2d 115 (5th Cir. 1973), <i>cert. denied</i> , 414 U.S. 1087 (1973)	10
United States Jaycees v. McClure, 534 F. Supp. 766 (D. Minn. 1982), <i>rev'd</i> , 709 F.2d 1560 (8th Cir. 1983)	3, 4, 6, 10, 19
United States Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983)	4, 11, 13, 14, 22, 23, 24, 25, 27
Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976), <i>aff'd</i> , 430 U.S. 703 (1977)	12

State Cases:

United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981)	3, 19, 20, 22, 25
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STATEMENT OF FACTS AND PROCEDURAL HISTORY

The United States Jaycees ("Jaycees") is a corporation incorporated under the laws of the State of Missouri (H.R. Vol. II, p. 6).¹

In 1979, the corporation had approximately 300,000 members and approximately 7,500 chapters nationwide. (D.C., pp. 12, 56). A chapter is a local arm or vehicle through which the Jaycee memberships are sold. From each membership sold, the Jaycees receive \$4.00. (H.R. Vol. I, pp. 72-76, 90-91).

A local chapter of the Jaycees is chartered upon submission to the Jaycees of a list of 20 male members along with a set of By-Laws which are in compliance with the By-Laws of the Jaycees (H.R. Ex. 1, pp. 4-5). The Jaycees retains the right to revoke a charter of a local chapter for "good cause". (H.R. Ex. 1, p. 7).

The Jaycees By-Laws draws a distinction between two types of members within the Jaycee organization: individual members, and associate individual members. (H.R. Ex. 1, pp. 3-4). "Individual members" include all male members between the ages of 18 and 35. An "associate individual member" is defined basically as any member who is not an individual member. The definition of an associate individual member further provides that such a member does "not have the right to vote or the right to be an officer or director of the United States Jaycees, State Organization Member, or a Local Organization Member." (H.R. Ex. 1, pp. 3-4).

¹ The Hearing Examiner's record will be referred to throughout this Brief by the letters "H.R.". The transcript of proceedings before the federal district court will be referred to throughout this Brief by the letters "D.C.". Exhibits to the record bear the abbreviation "Ex." after the venue designation.

A primary purpose of the Jaycees is to develop each member to his or her fullest potential. (H.R. Vol. I, p. 87). As a Jaycees Vice President testified, the Jaycees provides its members the opportunity to practice leadership and organizational skills, and attempts to "[b]uild tomorrow's leaders today." (D.C., p. 67). The organization's letterhead proclaims that it is a "Leadership Training Organization". (D.C., Plaintiff's Ex. 23). A number of former local Jaycee officers and directors testified that for them, the Jaycees was very successful in these areas. (See discussion, Part I.C., *infra*.)

In December, 1978, eight members from the Saint Paul and Minneapolis Jaycee chapters brought charges under the Minnesota Human Rights Act (Minn. Stat. Ch. 363 (1982)) ("the Act") before the Minnesota Department of Human Rights ("the Department"). These charges alleged that the Jaycees was engaging in an unfair discriminatory practice prohibited by Subdivisions 3, 6 and 7 of the Act (Minn. Stat. § 363.03 (1982)).² The allegations stemmed from threats by the Jaycees to revoke the charters of these local chapters because they allowed women full membership privileges of voting and holding office, contrary to the By-Laws of the Jaycees.

² Minn. Stat. § 363.03, Subd. 3 reads, in relevant part as follows:

"Public accommodations. It is an unfair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex."

Minn. Stat. § 363.03, Subd. 7 reads, in relevant part, as follows:

"Reprisals. It is an unfair discriminatory practice for any . . . public accommodation . . . to intentionally engage in any reprisal against any person because that person:

(1) Opposed a practice forbidden under this chapter"

Acting on these complaints, and after a hearing, a state hearing examiner found the Jaycees to be a public accommodation within the meaning of Minn. Stat. § 363.01 Subd. 18 (1982). *United States Jaycees v. McClure*, 534 F. Supp. 766, 767 (D. Minn. 1982). As a consequence, the examiner enjoined the Jaycees from taking any adverse action against the Saint Paul Jaycees and the Minneapolis Jaycees on the basis of each of their policies of according full membership rights to their women members. *Id.* at 768.

The Jaycees filed suit in United States District Court for the District of Minnesota ("the district court"), contending that the Act as applied to the organization's membership policies was an unconstitutional infringement upon its members' alleged rights of association under the first and fourteenth amendments to the United States Constitution. Additionally, the Jaycees claimed that the Statute was vague, overbroad, and violated the Fourteenth Amendment's Equal Protection Clause.

The district court certified to the Minnesota Supreme Court the question: "Is The United States Jaycees a 'place of public accommodation' within the meaning of Minn. Stat. § 363.01 Subdivision 18?" In its opinion, the Minnesota Supreme Court determined that the Jaycees is a "public business facility" falling within the statutory definition of "place of public accommodation." *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981).

In reaching its decision, the Minnesota Supreme Court, after extensively reviewing the legislative history of the Act, found that the Jaycees was clearly a business by reason of the fact that it sold individual memberships, with accompanying privileges, and that it was a "public business" in that it unselectively and vigorously sold memberships to the public. *Id.* at 771. Finally, the court determined that the Jaycees was

a business facility, since a business facility could be found at each site where a membership was sold. *Id.* at 772.

Addressing the constitutional issues raised by the Jaycees, the district court held that the Act was not void for vagueness because "a person of ordinary intelligence can understand what is prohibited by the Statute as construed". *United States Jaycees v. McClure*, 534 F. Supp. 766, 773 (D. Minn. 1982). The Court also found the Act was not unconstitutionally overbroad due to the construction placed upon it by the Minnesota Supreme Court, which limited the application of the Act to public business facilities which practiced sex discrimination. The Court found that there was "insufficient evidence in the record" to determine whether the Act would apply to other groups, as asserted by the Jaycees. *Id.* at 773. Finally, the district court found no protection legally available to alleged associational rights, where those alleged rights involve invidious discrimination. *Id.* at 770.

The Jaycees appealed to the United States Circuit Court of Appeals for the Eighth Circuit ("the appellate court"), where a divided court reversed the decision of the district court. The appellate court majority determined that the State of Minnesota's interest was not sufficiently compelling to outweigh the "incursion" on what the court determined to be a constitutionally protected right of association applicable to the Jaycees. *United States Jaycees v. McClure*, 709 F.2d 1560, 1578 (8th Cir. 1983). Moreover, the appellate court found that the Minnesota Supreme Court had interpreted the Act in such a way that it must be determined void for vagueness. *Id.* at 1578.

After Appellants' Motion for a Rehearing En Banc was denied by an equally divided court, appellants appealed to this Court, which noted probable jurisdiction. 52 U.S.L.W. 3497 (U.S. Jan. 9, 1984) (No. 83-724).

SUMMARY OF ARGUMENT

I. The legislative policy contained in the present version of the Minnesota Human Rights Act has two parts. The first part addresses the importance to the State of securing for its citizens freedom from gender-based discrimination in public accommodations, and the second declares the legislature's intention to create a "civil right" for Minnesotans to obtain full and equal utilization of public accommodations without regard to gender. These rights may be enforced either by action taken by the State, or by a direct right of private civil action created under the statute.

The appellate court balanced these interests against what it found to be constitutionally cognizable associational rights of the Jaycees. In doing so, however, the appellate court misapplied precedent established by this Court and other courts for carrying out this balancing, and misconstrued the interests of the State of Minnesota. Additionally, the appellate court either ignored or gave insufficient consideration to the adverse impact upon the civil rights of Minnesotans guaranteed by the Minnesota Human Rights Act.

II. The Jaycees were correctly characterized as a "public accommodation" by the Minnesota Supreme Court on the basis of identifiable criteria drawn from an established body of case law. As such, the Act is not unconstitutionally vague because the Jaycees can look to those standards and that body of case law in determining what they would need to do if they want to remove their organization from the State's restrictions on sex discrimination in public accommodations. Additionally, the line drawn by the Minnesota Supreme Court's interpretation of the Minnesota Human Rights Act between "public" and "private" membership organizations is a principled one, which does not lend itself to regulation of

membership practices of those organizations which have not voluntarily thrust themselves on a mass membership basis into the commercial marketplace.

III. The Jaycees raised an equal protection argument which was not considered by either the district court or the appellate court. However, should this Court address that claim, the Minnesota Supreme Court's opinion contains a statutory interpretation drawing a principled and constitutional basis for distinguishing between "public" and "private" accommodations.

ARGUMENT

I. The State of Minnesota's purpose in protecting and promoting the civil rights of all its citizens is a compelling one which outweighs whatever constitutional protection might otherwise be afforded the associational rights of the Jaycees.

A. The Minnesota Human Rights Act Reflects a State Policy Placing High Value on Protecting Citizens from Discrimination on the Basis of Sex.

The District Court for the District of Minnesota ("the district court") analyzed the purposes clause of the Minnesota Human Rights Act ("the Act") in light of both the Minnesota Supreme Court's interpretation of the scope of the Act's "public accommodation" section and the legislative history of that section. The district court concluded that the Minnesota legislature's policy reflected in the Act is "to prohibit sex discrimination to the same extent as racial discrimination." *United States Jaycees v. McClure*, 534 F. Supp. 766, 771 (D. Minn. 1982). As the district court noted, "protection of citi-

zens from discrimination on the basis of sex is a legitimate interest . . . which [the State of Minnesota] has chosen to value highly." *Id.* at 772.

The Act's purposes are set forth in Subdivisions 1 and 2 of Minn. Stat. § 363.12 (1982). Subdivision 1 of the Act enunciates the State's policy to secure for its citizens freedom from discrimination on the basis of sex in a number of areas, including access to public accommodations. This policy is based on a stated premise that such discrimination "threatens the rights and privileges of the inhabitants of the state and menaces the institutions and foundations of democracy." Minn. Stat. § 363.12, Subd. 1 (1982).

Subdivision 2 of the Act declares as a "civil right" of Minnesotans the opportunity to obtain, *inter alia*, "full and equal utilization of public accommodations" without discrimination on the basis of sex. Minn. Stat. § 363.12, Subd. 2 (1982).

The Act provides rights of action both to the State in order to promote and protect its public policy against discrimination in public accommodations (Minn. Stat. § 363.06 (1982)), and to any person seeking redress for deprivation of his or her civil rights by means of unfair discriminatory practices. Minn. Stat. § 363.14 (1982). The unifying principle underlying the Minnesota Human Rights Act is thus one of promoting an environment within the state whereunder Minnesotans of any sex, race or creed will have equality of opportunity and access to those institutions which have acquired through their own practices an identifiable degree of significance in the consumer or commercial marketplace.

Because of the significance of the areas addressed in the Act—employment, housing, real estate, public accommodations, public services and educational institutions—Minnesota has determined that discrimination in access to these institu-

tions deprives those of its citizens denied such rights of more than just the right to walk in the door of such institutions. Rather, the very "institutions and foundations of democracy" are "menaced" when access to institutions of such public significance is denied. Minn. Stat. § 363.12, Subd. 1 (1982).

The record in this case demonstrates that affirmance of the appellate court's decision, permitting the Jaycees to exclude women from equal membership rights, would result in deprivation of the very type of fundamental civil rights which the Minnesota legislature has declared it the State's policy to protect and promote. As will be discussed in Part I.C., *infra*, the record further demonstrates that the rights of access protected by the statute are inextricably interwoven with such fundamental, personal rights as those of free speech and travel which have long been accorded the highest priority by this Court.

The balancing of these respective interests of the State and its citizens against the alleged associational rights of the Jaycees will be addressed in the two sections which follow.

- B. The State of Minnesota's interest in free and equal access to public accommodations for all its citizens is similar to interests which have been recognized as compelling by this Court and other courts.

If First Amendment rights to free association of the Jaycees are compromised by the Minnesota Human Rights Act, then in order for this legislation to be upheld, the State must demonstrate a sufficiently important interest and employ means closely drawn to avoid unnecessary abridgement of associational freedom. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). It must also be remembered, however, that "the right to asso-

ciation [is not] absolute". *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973).

The State of Minnesota's interest in free and equal access to public accommodations for all its citizens is the type of interest that this Court and other courts have long recognized as compelling. In fact, this Court in some circumstances has held equal access to public accommodations to outweigh infringements even on "core" First Amendment rights.

For example, in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945), this Court found that a New York statute requiring labor organizations not to deny any person membership by reason of race was constitutional. This Court, in upholding the statute, found that the statute did not "offend the due process clause of the Fourteenth Amendment as an interference with [a labor union's] right of selection to membership." *Id.* at 93.

In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court recognized that free and equal access to public schools was an interest to be accorded the highest priority. And, in *Norwood v. Harrison*, 413 U.S. 455, 470 (1973), this Court stated:

"Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."

Accord Runyon v. McCrary, 427 U.S. 160, 176 (1976) ("[T]he constitution places . . . no value on discrimination").

A footnote to the above discussion in *Norwood v. Harrison*, *supra*, cites 42 U.S.C. § 3601, *et seq.*, as an example of "other significant contexts" in which Congress has made discrimination unlawful. This statute, which bars race and gender dis-

crimination in private housing transactions, was recently upheld against a First Amendment challenge in *United States v. Bob Lawrence Realty, Inc.*, 313 F. Supp. 870 (N.D. Ga. 1970), *aff'd*, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 414 U.S. 1087 (1973). In its ruling, the lower court determined that "any inhibiting effect that [the statute] may have upon speech is justified by the government's interest in protecting its citizens from discriminatory housing practices and is not violative of the First Amendment." 313 F. Supp. at 872. *Accord Barrick Realty, Inc. v. City of Gary, Indiana*, 354 F. Supp. 126, 135 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974) (rejecting First Amendment and "right to travel" claims).

The interest in obtaining free and equal access to places of public accommodation for all citizens is thus a compelling interest which has been accorded high priority by this and other Courts, even where it has in some way impinged upon other parties' First Amendment rights.

In the case before this Court, the district court found no need for resort to the detailed constitutional balancing involved in the previously cited cases. Instead, the court found the Jaycees to be engaged in the type of "invidious private discrimination" which deprives them of affirmative constitutional protection under *Norwood v. Harrison*, *supra*. *United States Jaycees v. McClure*, 534 F. Supp. 766, 771 (D. Minn. 1982).

This Brief will not analyze the disagreement between the district and appellate courts over whether the Jaycees' activities involve judicially cognizable associational rights. Instead, this Part and the following Part (I.C.) of the Brief analyze, respectively, some of the case law and record evidence supporting the district court's alternative holding (534 F. Supp. at 771) that, even if the Act impinges on the Jaycees' associational rights, the Minnesota legislature's purposes are sufficiently compelling to override the Jaycees' claimed asso-

ciational rights. Additionally, the rights of individuals within the scope of the Act's protection must be taken into account in any constitutional balancing which may be required.

The appellate court, we respectfully submit, failed to comprehend the full extent to which reversal of the district court's decision would undermine Minnesota's interests in the application of its Human Rights Act. Additionally, the appellate court misapplied a number of this Court's precedents to the facts of this case.

The appellate court offered several reasons for determining that Minnesota's statutory scheme should not prevail over the Jaycees' asserted rights. First, the court indicated that Minnesota's interest in banning discrimination in public accommodations would be less impacted by an adverse court decision in this case than if a statute aimed only at discrimination in membership policies by groups of a certain size had been held unconstitutional, since the Act would still be available to strike down other forms of discrimination. *United States Jaycees v. McClure*, 709 F.2d 1560, 1573 (8th Cir. 1983). It is very difficult to understand why a state's interest in all portions of a broad remedial statute such as the Minnesota Human Rights Act should be less compelling than if the legislation had focused on only a single aspect of the problem, which the circuit court's strained analysis suggests might have led it to a different result. *Id.*

The appellate court also suggested that the State's interest was weaker because the Act is selectively enforced. *Id.* at 1573. However, there is simply no evidence in the Record to suggest any selective enforcement. Further, even if the Minnesota Supreme Court had been required to rule on attempts to enforce open, gender-neutral membership practices on other organizations besides the Jaycees, the Record establishes several unique attributes of the Jaycees which distinguish it from more traditional private associations, including the Kiwanis. See Part II. B., *infra*.

Finally, the appellate court stated, without citing specific authority, that once a First Amendment challenge is raised to a statutory scheme, the burden of proving a justifiable interference with First Amendment rights shifts to the government. *Id.* at 1576. However, as the appellate court's dissent points out, a large body of case law suggests that shifting the burden of proof is not appropriate where, as in the case at hand, a statute is aimed at the conduct or practice of discrimination, and the burden it imposes on a party's asserted right of association "... has, at best, a hypothesized nexus to any deterrence of other protected First Amendment rights." *Id.* at 1581 (Lay, J., dissenting).

This court has recently held that parties asserting the constitutionality of gender-based classifications must show an "extremely persuasive justification" for such classification. See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1983).³ The appellate court did not require such a

³ The majority and dissenting opinions in *Mississippi University for Women v. Hogan* sharply disagreed on the question of whether otherwise equal educational opportunities could be made unequal by reason of locational convenience. Additionally, the *Mississippi University for Women* case involved a challenge to alleged discrimination by a public institution of higher education. Nevertheless, both majority and minority opinions in that case were in agreement that separate provision of educational opportunities would be struck down unless a showing could be made that such opportunities were truly equal for both sexes. *Accord* (on this point) *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), *aff'd*, 430 U.S. 730 (1977). In the case before us, the record evidence clearly establishes the absence for many women of leadership opportunities in other organizations which would be as effective for their professional advancement as those provided by the Jaycees. Where a membership organization has voluntarily engaged in the substantial degree of involvement in the commercial marketplace necessary to make it a "public accommodation" under Minnesota law, such a party reasonably should be expected to bear a correspondingly greater burden of proof in establishing the absence of harm to a protected class because of availability of alternative, allegedly equivalent opportunities.

justification, suggesting instead that the State of Minnesota could express its antipathy to the Jaycees' discriminatory practices in a number of ways the court suggested would be less intrusive on the Jaycees' freedom of association. *United States Jaycees v. McClure*, 709 F.2d at 1573. However, this analysis is without support in the record and ignores the Minnesota legislature's implicit determination that nothing works to end discrimination in public accommodations like banning discrimination in public accommodations. See, e.g., Minn. Stat. §§ 363.071, Subd. 2 (1982). Moreover, as will be discussed in the following section (Part I.C.), even if those means were equally effective ones for the State of Minnesota to achieve its purpose of a more discrimination-free marketplace, they would hardly be beneficial to women Jaycee members whose individual statutory rights to freedom from gender-based discrimination are also established and protected by the Act.

- C. The Minnesota Human Rights Act promotes and fosters such rights of the State's citizens as those of free speech and travel, long recognized by this Court as fundamental, and interwoven in this case with the specific statutory rights created.

While the State of Minnesota's interest in maintaining its statutory framework for combating discrimination in public accommodations and institutions is in itself a compelling interest, it is not the only set of interests created or promoted by the Minnesota Human Rights Act. As noted in part A. of this section, the Act's purposes include the establishment of a civil right for every Minnesotan to full and equal access to public accommodations, a right which, along with others

created by the Act, is enforceable under the Act's private civil action section.

The rights of citizens to be free from discrimination in jobs, housing, and institutions or organizations with sufficient commercial prominence to qualify as "public accommodations" are, of course, important rights in and of themselves. As important as they are, however, there are even more basic rights—the rights of free speech and travel—which the record in this case demonstrates are interwoven with the specific statutorily protected rights.⁴ These additional rights are fostered and promoted by the enforcement of the statute at issue.

Although, the appellate court determined that Minnesota's ban on discrimination by the Jaycees violated that organization's First Amendment rights of association "without significant justification," the majority conceded the compelling nature of the State's interest in "clear[ing] the channels of commerce of the irrelevancy of sex" and making sure that goods and services and advantages in the business world are available to all on an equal basis. *United States Jaycees v. McClure*, 709 F.2d 1560, 1572, 1578 (8th Cir. 1983). However, the appellate court did not find the asserted interest sufficiently compelling under the particular "circumstances of this case." *Id.* at 1576. The court specified that "if the record showed that membership in the Jaycees was the only practicable way for a woman to advance herself in business or professional life, a different sort of weighing would have to take place, and such a statute might be upheld." *Id.* at 1573.

⁴ These fundamental individual freedoms have, of course, long been recognized in the opinions of this Court. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 326-327 (1937), *rev'd on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969) (free speech); *Kent v. Dulles*, 357 U.S. 116, 125-126 (1958) (right to travel).

The record, however, expressly shows that there really are no other organizations with comparable professional development and related opportunities for women. (*See, e.g., H.R. Vol. I, pp. 193-194*). The very prominence and size which the Jaycees have sought and attained has given their training unique value for employees and unique recognition in the eyes of employers. There is much in the record to suggest that the Jaycees' prominence in the leadership training area, and not the organization's occasional public policy pronouncements, is the dominant characteristic employers associate with the Jaycees in encouraging participation by their employees.

For example, Ms. Kathryn Ebert testified that her service as a Minneapolis Jaycee Vice President was her "most valuable experience" during her membership in the Minneapolis Jaycees. (*H.R. Vol. I, p. 197*). Her experience as a Vice President and member of the Board of Directors offered her the opportunity to "interface with all of the Board members [and] . . . communicate with the Board of Directors in a leadership direction". (*H.R. Vol. I, p. 191*). She also stated that as a Vice President she had supervisory responsibility over four committees, which meant she was "supervising [approximately] one hundred people" and "learn[ing] how to draw out their talents." (*H.R. Vol. I, pp. 190, 192-193*).

Moreover, because of her involvement with the Minneapolis Jaycees, she was promoted in her job in a large retail store from work of an "individual nature" to work in which she had to deal with a "team [of] people" and "motivate them" and "communicate with clients". (*H.R. Vol. I, pp. 191-192*).

Similarly, the President of the Minneapolis Jaycees, Mr. Valdis Vavere, testified that being an officer or director provides women with increased speech opportunities for expression in group settings that they would not enjoy as an associate member. (*See H.R. Exhibit 1*). Mr. Vavere explained that

the management and speaking skills gained as a director were "more sophisticated" than the skills experienced as a program chairman, the highest level available to associate members. (H.R. Vol. I, pp. 160-161).

The testimony of Ms. Kathleen Hawn likewise indicates how her speaking and organizational skills were developed as a Jaycee Director. She testified that as an officer she supervised 12-13 different projects. (H.R. Vol. I, p. 204). She also stated that her experience on the Board of Directors increased her ability to interact and communicate with men in a business-type situation. (H.R. Vol. I, pp. 205-206). As a result of the skills she gained from her Board position, she was promoted within a large insurance company to a supervisory position. (H.R. Vol. I, pp. 201-203).

As a final example from the record, the testimony of Ms. Sally Pederson indicates how the Jaycees have both fostered and promoted her ability and right to travel as well as her right to speak. Prior to coming to Minneapolis, Minnesota, Ms. Pederson had lived in Rochester, New York. There she had been employed by Eastman Kodak originally as a Lab Technician, working alone in a research lab (H.R. Vol. I, pp. 210-211).

Ms. Pederson testified that she had requested a job change from the lab to sales, but was denied the job because she was too young. She was told by her employer to join the Jaycees. (H.R. Vol. I, p. 211).

As a Rochester Jaycee, Ms. Pederson was able to serve on the Board of Directors for one year, a position which would no longer be available to her under the Jaycee By-Laws. (H.R. Ex. 1). Ms. Pederson testified that she went back to Kodak after her experience with the Rochester Jaycees and was

promoted to "Customer Support Representative" after interviews that dealt in part with her Jaycee activity. She testified that the "biggest reason" she received the new job was her involvement with the Jaycees. (H.R. Vol. I, p. 211).

Following her promotion, Ms. Pederson was transferred to Minneapolis, Minnesota. Her new job entailed training people who would be using Eastman Kodak photocopiers and keeping in contact with approximately 100 Eastman Kodak customers to make sure that they were satisfied with the product and service. (H.R. Vol. I, pp. 209-210).

Once in Minneapolis, Ms. Pederson joined the Minneapolis Jaycees and was elected a member of the Board of Directors and a Vice President. As Vice President, she oversaw four committees, composed of approximately 40 to 50 people (H.R. Vol. I, p. 208). Ms. Pederson testified that "without being a Director and a Vice President, I would never have gained the leadership skills and communication skills that I developed". (H.R. Vol. I, p. 214).

Ms. Pederson testified that she would be leaving for Rochester, New York, because of a new job she had applied for and received from Eastman Kodak. (H.R. Vol. I, p. 212). She testified that she interviewed for the job with seven men, that each interview was approximately 30 to 40 minutes long, and that approximately 10 minutes of each interview concerned her Jaycee activities. (H.R. Vol. I, pp. 212-213). Thus, not only her speaking skills, but also her opportunities for geographic mobility were enhanced by these types of Jaycee experiences, which the Jaycees wishes to reserve only for men.

Therefore, the record does in fact reveal how the enforcement of the Minnesota Human Rights Statute, so as to prevent the Jaycees from revoking charters of local chapters granting

women equal status, fosters and promotes both equal professional opportunities and, indirectly, more fundamental rights for actual and prospective women members. The record shows that for many women, exclusion from full membership in the Jaycees, with attendant opportunities for leadership positions, may be as professionally devastating as being excluded from a union was found to be in *Railway Mail Association v. Corsi*, 326 U.S. 88, 94 (1945).

II. The Minnesota Supreme Court Relied Upon Identifiable and Accepted Criteria in Determining the Scope of the Public Accommodation Section of Minnesota's Human Rights Act.

A. The Plain Language and Judicial Interpretation of the Minnesota Human Rights Act Leave No Vagueness as to Whether the Jaycees is a Public Accommodation Under the Act.

The Minnesota Human Rights Act defines "place of public accommodation" in the following manner:

"'Place of public accommodation' means: A business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public."

Minn. Stat. § 363.01, Subd. 18 (1982).

In deciding the certified question put to it regarding whether the Jaycees organization fits within the above definition, the Minnesota Supreme Court relied upon two criteria for deciding in the context of a public accommodations statute,

whether a group is private or public. These criteria were (1) the selectiveness of a group in the admission of members; and (2) the existence of limits on the total size of the group's membership. *United States Jaycees v. McClure*, 305 N.W.2d 764, 770 (Minn. 1981). Applying those tests, the Court held that the Jaycees qualified as a "public business facility" by being "engaged in the business of seeking to advance its members and to add to their ranks by assiduously selling memberships in this State . . ." *Id.* at 774. The district court determined that the criteria for becoming a "public business facility" developed by the Minnesota Supreme Court from established case law were ones which a person of ordinary intelligence could understand and apply to his or her organization's particular situation. *United States Jaycees v. McClure*, 534 F. Supp. at 773.

The record in this case supports the determinations by the Minnesota Supreme Court and the district court that the Jaycees falls squarely within the statutory definition of a "public accommodation". The key aspects of that definition are that the entity in question be a "business facility" which offers "goods" to the "public".

First, the record reveals that the Jaycees not only sells memberships but sells a wide variety of other products such as plaques, T-shirts, watches, clocks, suitcases, pens and jewelry to the general public and to state and local Jaycee organizations. (H.R. Vol. I, pp. 78-79 & Vol. II, pp. 56-57 & Ex. 15). The annual report of the Jaycees (H.R. Exhibits 80 and 99) looks like that of many successful, profitmaking corporations. Success is measured by growth, which of course results in more revenues. (H.R. Vol. II, p. 61). In fact, growth is stressed by special awards for those who are the most successful in selling memberships. (D.C. pp. 64-65). Approximately 30% of the time of the Minnesota Jaycees President is

devoted to recruiting members or encouraging recruitment. (H.R. Vol. I, p. 46).

The record is also clear that a membership in the United States Jaycees is a "product", "good", "privilege", or "advantage" within the meaning of the Act. The Jaycees receives a fee for each membership sold through its chapters. (H.R. Vol. I, pp. 72-76). The membership that is sold is portrayed to prospective members not only as conveying the right to join with others, but also, it is portrayed as a vehicle by which the individual becomes a leader of tomorrow (D.C. pp. 67, 70) and a vehicle whereby a person can develop to his fullest potential and practice and refine his leadership and organizational skills (D.C. p. 67; H.R. Vol. I, p. 31).

In fact, the Jaycees *Recruitment Manual* states "most importantly, Jaycees offer every young man the opportunity for leadership, training and personal growth". (H.R. Ex. 24, p. 1). The letterhead on Jaycees stationery states in capital letters: "A Leadership Training Organization" (Pl.'s Ex. 23). Also see H.R. Ex. 33, a state "Jaycee" publication which states:

"No matter what a man's occupation, he can be a leader. For 59 years now, Jaycees have helped young men develop their leadership abilities . . . Realize your potential . . . Be a leader for tomorrow . . . and today. Be a Jaycee."

Additional exhibits were discussed in the Minnesota Supreme Court's opinion. See *United States Jaycees v. McClure*, 305 N.W.2d 764, 769 (Minn. 1981).

Thus, it is clear that the Jaycees not only operates in many respects like a business, selling its products, including memberships, but that it also considers itself in business as such. Consequently, the Jaycees cannot claim that they did not realize that they are in a business of selling goods. Nor can they claim surprise that they are considered a public business, in light of the fact that the product—i.e., the memberships—they sell are indiscriminately offered and sold to the public.

For example, Mr. Lowell Larson, President of the Minnesota Jaycees, testified that the National Jaycees do not publish any criteria as to how members may be selected. In fact, he stated "I would feel that the National organization and the Minnesota Jaycee organization probably goes the opposite. It encourages membership [from] as many people and as diverse as possible." (H.R. Vol. I, p. 112).

Similarly reflecting the lack of selectiveness or restrictions on membership size is the testimony of Mr. Valdis Vavere, then President of the Minneapolis Jaycees. He testified that corporations are periodically contacted with the request to sponsor "a certain *number* of members from the organization". (Emphasis added.) (H.R. Vol. I, p. 125). Techniques for selling memberships even included door-to-door solicitations. (H.R. Vol. I, pp. 126, 127). Moreover, Mr. Vavere testified that there are no selection committees passing on the merits of the members, there are no background investigations of the members who apply, and, to his knowledge there has never been a membership rejection. (H.R. Vol. I, p. 135).

Finally, Mr. Vavere testified that the National organization has no membership criteria which local chapters are suggested to use. (H.R. Vol. I, pp. 135-136). In fact, he testified:

... [W]e are in fact encouraged not to choose any kind of characteristics in terms of who we should and should not take, that anyone should be accepted without any value judgments on our part.

(H.R. Vol. I, p. 136).

Similarly, Mr. Dan Aberg, then President of the Saint Paul Jaycee Chapter, testified that in recruiting the Jaycees instruct the local chapters not to be "an elitist organization" and that "everyone should be considered". (H.R. Vol. I, p. 162).

Mr. Aberg also testified that the Saint Paul Chapter sold memberships by knocking on doors and going to shopping centers, that the Saint Paul Chapter attempts to sell memberships to "different diverse areas and ethnic backgrounds", and that a conscious effort is made not to sell memberships to people who are only within certain occupations. (H.R. Vol. I, p. 171).

There is apparently no dispute that the national organization has facilities where its memberships are sold, especially since memberships are sold through a local chapter organization, which is clearly a facility, and at various meeting places, such as hotels, apartment buildings and the like. (See H.R., Exhibits 13A, 13C, 13F and H.R. Vol. I, pp. 72-76).

In spite of the record described above, and along with the definitive determination by the Minnesota Supreme Court based on this record that the Jaycees is a "public accommodation" subject to the Minnesota Human Rights Act, the circuit court held the "public accommodation" section of the Act unconstitutionally vague because of the absence of criteria for establishing an organization's "private" status. *United States Jaycees v. McClure*, 709 F.2d 1560, 1578 (8th Cir. 1983). This determination was apparently based, in substantial part, on an unexplained statement in the opinion of the Minnesota Supreme Court that the Jaycees are demonstrably different from "private organizations such as the Kiwanis International Organization." *United States Jaycees v. McClure*, 305 N.W.2d 764, 771 (Minn. 1981).

The circuit court's determination in this regard should be reversed on the grounds advanced in Judge Lay's dissenting opinion. 709 F.2d at 1581-82. As Judge Lay pointed out, Kiwanis applies criteria for membership which are both selective and restrictive on the size of that organization's

membership.⁵ Additionally, the record is bare of any evidence that the Kiwanis sells memberships which carry not only an entitlement to be a member of a certain group of people, but also the promise of assistance in becoming a leader and developing leadership skills, speaking skills, and organizational skills.

This *Amicus Curiae* also relies on the case law analysis included in Judge Lay's dissent, which references accepted principles of constitutional adjudication whereunder organizations like the Jaycees "who clearly fit within the definition of a 'place of public accommodation,' ha[ve] no standing to challenge the vagueness of [a] statute as construed and applied to hypothetical organizations not before [the court]." 709 F.2d at 1582 (Lay, J., dissenting).

Similar principles have been applied even in the case of "vagueness" challenges to criminal statutes. For example, in *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952), this Court reached the following conclusion:

"A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties. . . . But few words possess the precision of mathematical symbols. . . . Consequently, no more than a

⁵ Section 4. *Active Membership*

...
 "b. The active membership of this club shall be composed of a cross section of those who are engaged in recognized lines of business, vocation, agriculture, institutional or professional life, or who having been so engaged, shall have retired. The number of members in any one given classification shall not exceed twenty percent (20%) of the total active membership.

c. No man shall be eligible to membership in this club who holds membership (other than honorary) in any other Kiwanis club or service club of like character."

...
 (H.R. Ex. A)

reasonable degree of certainty can be demanded. *Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.*" (Emphasis added).

Assuming that the Jaycees could reasonably contend that the question whether their membership policies and commercial orientation made them a "public accommodation" was a "close" one, a vagueness argument thus would still not be supportable even under the criminal law standard set out in the above quotation.

B. Readily Identifiable Criteria are Available to Limit the Scope of the Public Accommodations Section of the Minnesota Human Rights Act to Constitutionally Permissible Applications and Thereby Avoid Potential Overbreadth Concerns.

This *Amicus Curiae* strongly encourages this Court to review the appellate court's implicit determination of unconstitutional overbreadth, 709 F.2d at 1577, under the principles set forth in this Court's decision in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). In *Broadrick*, this court stated the general principle of, and limitations on, the "overbreadth" doctrine as follows:

. . . any enforcement of a statute thus placed at issue is totally forbidden until and unless a limited construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. *It has been employed by the court sparingly and only as a last resort.*

Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." (Emphasis added).

Id. at 613.

As Judge Lay's dissenting opinion observes, "[t]he potential effect of this statute on protected associational choices is mere speculation." *United States Jaycees v. McClure*, 709 F.2d at 1583 (Lay, J., dissenting). In fact, the Minnesota Supreme Court's interpretation of the Act, which should receive great deference from this Court even in the face of the constitutional challenge, specifically stated that "[p]rivate associations and organizations—those, for example, that are selective in membership—are unaffected by Minn. Stat. § 363.01(18) (1980). Any suggestion that our decision today will affect such groups is unfounded." *United States Jaycees v. McClure*, 305 N.W.2d at 771.

Especially in light of this limiting construction by the Minnesota Supreme Court, it is difficult to understand how the Jaycees can claim that the Act would chill the First Amendment rights of other groups which are not public accommodations. The court noted that the factors making the Jaycees a public accommodation are the facts that it is a business facility, and that it sells and offers its products and memberships indiscriminately to the public. Further, the Court found that the product sold is not merely a membership, but also such professionally applicable rights and benefits which go along with that membership as the professed benefit to the member of becoming a "leader of tomorrow" and developing his or her potential to the fullest. The record in this case is simply devoid of examples of organizations with more selective membership criteria and limitations on numbers which engage in these same types of activities to the same extent as the Jaycees.

Ironically, many of the organizations cited by the Jaycees as an indication that speech of others would be chilled in light of the statute at issue and its interpretation by the Minnesota Supreme Court, do in fact have limiting criteria in their By-Laws as to the scope of membership which clearly differentiate them from the Jaycees and indicates that those groups would not be subject to the public accommodations statute.

The restrictive membership requirements contained in the Kiwanis International By-Laws have been discussed in the preceding section of this Brief and are set forth in footnote 5. *supra*. Similarly, the By-Laws of the Rotary organization which were also introduced by the Jaycees are clearly distinguishable from the Jaycees by reason of their membership criteria. Specifically, the constitution of the Rotary Club explicitly states that members must be, *inter alia*, adult males and must be in the upper management echelons of their companies. (H.R. Ex. F).

These restrictive membership criteria are clearly more restrictive than the membership criteria of the Jaycees and thus the Rotary would clearly be a private organization and not subject to the Minnesota Statute.

The by-laws of other organizations, which were introduced by the Jaycees into evidence, also show selectivity characteristics in membership criteria and rules, which the Jaycees do not maintain. Therefore, they are clearly distinguishable and do not fall within the scope of this statute as construed by the Minnesota Supreme Court.

For example, the Lions Club By-Laws indicate that membership may be by "invitation only" (H.R. Exhibit D, p. 13); the By-Laws of PEO Sisterhood impose a residency requirement and one that the member must have resided in the community for at least 12 months prior to becoming a member of

the local chapter (H.R. Exhibit 24, p. 39); and the By-Laws of the Junior League require that a member may only be a member of one Junior League chapter at a time (H.R. Exhibit C, p. 4). Finally, the By-Laws of the Optimist Club require membership to be a "cross section of the business, social and cultural life of the community." (H.R. Ex. G, Article V).

Thus, the Jaycees' overbreadth argument also fails to withstand careful scrutiny, since (1) the Minnesota Human Rights Act has been narrowly construed by the Minnesota Supreme Court; (2) the organizations which the Jaycees claim are potentially chilled by the statute are clearly distinguishable simply on the basis of their membership criteria; and (3) there is absolutely no evidence in the record indicating other similarities between the Jaycees and those other organizations.

III. The Minnesota Human Rights Act does not violate the Fourteenth Amendment's Equal Protection Clause.

The District Court did not consider the "equal protection" claim in the Jaycees' complaint, on the grounds that the Jaycees had "chosen not to pursue that claim." *United States Jaycees v. McClure*, 534 F. Supp. at 768 n. 6. In its Appellate Brief, the Jaycees condemned that decision, argued that the Appellate Court was fully empowered to determine this issue on appeal, and "defied" the State of Minnesota to offer a rational basis for different treatment under the law of the Kiwanis and Jaycees organizations. Brief for Plaintiff-Appellant at 47-48, *United States Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983).

Although the appellate court, like the district court, failed to address this issue, this *Amicus Curiae* will briefly address the equal protection issue in the event that this Court should consider the Jaycees' equal protection claim.

In *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), this Court stated as follows:

"As in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment."

In the case at hand, the "appropriate governmental interest"—that of securing for the citizens of the State of Minnesota equal access to places of public accommodation—is clearly an appropriate governmental interest, especially in light of its inextricable connection between that state interest and the personal, fundamental rights of Minnesota citizens fostered by the statutory anti-discrimination provisions. Thus, the only question is whether that interest is suitably furthered by differential treatment accorded to "private" organizations as opposed to "public accommodations", as this distinction has been drawn by the Minnesota Supreme Court.

This *Amicus Curiae* asserts that it is proper to accord private organizations differential treatment as compared to public organizations for two reasons. First, the Act, by its explicit terms, requires such a distinction. See Minn. Stat. § 363.03 (1982). Secondly, the Act is obviously narrowly tailored to achieve its legitimate objective in the case of organizations which by their membership policies and other activities have thrust themselves into the commercial marketplace, with minimal intrusion on constitutional rights of organizations which have not done so.

In other words, the stated governmental purpose is to assure that places of public accommodation do not deny goods and privileges to anyone on account of gender. Minn. Stat. § 363.12. This intent is furthered, since the Act explicitly prohibits discrimination on account of sex in places of public accommo-

dations. Minn. Stat. § 363.03, Subd. 3. The Act is narrowly tailored so that only public accommodations are explicitly affected by this Act, and not private accommodations. Thus, the dictates of this Court's decision in *Police Dep't of Chicago v. Mosley*, *supra*, have been satisfied.

As noted, the Jaycees in their Brief to the Court of Appeals challenged the Appellants to set forth any reason for distinguishing between "public" and "private" accommodations. This *Amicus* asserts that one reasonable basis to distinguish between public and private accommodations is that the State legislature may have concluded that the invidious effects of sex discrimination in public accommodations is far greater than that of such discrimination in private accommodations. Certainly, the record in this case confirms the wisdom of such a rationale in the case of the Jaycees.

Finally, this *Amicus* wishes to remind the Court that it has never required a State legislature to deal with all evils it perceives at once. As this Court stated in *Railway Express Agency v. State of New York*, 336 U.S. 106, 110 (1949), "it is no requirement of equal protection that all evils of the same genus be eradicated or none at all."

CONCLUSION

Based upon the arguments set forth in this Brief, Community Business Leaders respectfully supports Appellants' request herein that this Court reverse the decision of the United States Court of Appeals for the Eighth Circuit and make an express finding that Minnesota Statutes, § 363.03 (1982), as applied in this particular situation, is constitutional.

Respectfully submitted,

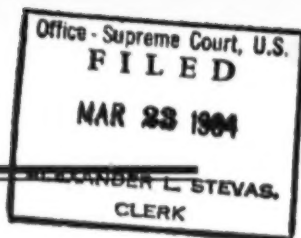
ELDON J. SPENCER, JR.
O'NEILL, BURKE, AND
O'NEILL, LTD.

(Counsel of Record)

MICHAEL B. BRAMAN
CHRISTINE L. MEUERS

800 Norwest Center
55 East Fifth Street
St. Paul, Minnesota 55101
(612) 227-9505

No. 83-724



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

KATHRYN R. ROBERTS, Acting Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY, III, Attorney
General of the State of Minnesota;
and GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Appellants,

v.

THE UNITED STATES JAYCEES, a non-profit Missouri
corporation, on behalf of itself and its qualified members,
Appellee.

On Appeal From The United States Court Of Appeals
For The Eighth Circuit

**BRIEF OF CONFERENCE OF
PRIVATE ORGANIZATIONS AS
AMICUS CURIAE IN SUPPORT
OF AFFIRMANCE**

LEONARD J. HENZKE, JR.
Attorney
LEHRFELD & HENZKE, P.C.
1301 Pennsylvania Avenue, N.W.
Suite 1110
Washington, D.C. 20004
Telephone: (202) 659-4772
*Counsel for Amicus Curiae
Conference of Private Organizations*

TABLE OF CONTENTS

	Page
INTEREST OF THE CONFERENCE OF PRIVATE ORGANIZATIONS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. THE COURT OF APPEALS CORRECTLY HELD UNCONSTITUTIONAL THE COMMISSION'S MANDATORY ORDER REQUIRING THE JAYCEES TO ADMIT WOMEN TO ITS INTERNAL GOVERNING AND VOTING PROCESSES.	7
A. Government Is Prohibited By The Freedom-Of-Association Guarantee From Interfering With The Class Membership Restrictions Of Voluntary Associations.	7
B. The Mandatory Order Of The Minnesota Commission Grossly Intrudes Upon The U.S. Jaycees' Constitutional Right To A Restricted-Class Membership Association.	9
1. The manner or size of membership recruitment does not destroy the associational rights of a restricted-class membership association.	10
2. A restricted-class membership association's influence and involvement with the community do not give rise to public accommodations status.	14
3. Membership associations do not lose their right to maintain restricted-class membership qualifications by making certain programs or facilities available to the general public.	16
4. The associational rights of membership organizations are not limited to activities expressly enumerated in the First Amendment.	16
5. Admitting the public to the internal membership processes of an association is not a proper remedy in a public accommodations proceeding.	20

Table of Contents Continued

	Page
6. The Minnesota tribunals erred in confusing the standards for a restricted-class membership association with the standards of a "truly private" club.	22
II. THE MINNESOTA COMMISSION HAS SHOWN NO COMPELLING PURPOSE FOR ITS MANDATORY ORDER WHICH SEVERELY ABRIDGES THE U.S. JAYCEES' ASSOCIATIONAL RIGHTS.	25
CONCLUSION	28

TABLE OF AUTHORITIES

CASES:	Page
<i>Bob Jones University v. United States</i> , 103 S.Ct. 2017 (1983)	26
<i>Brown v. Dade Christian Schools</i> , 556 F.2d 310 (5th Cir. 1977)	26
<i>Bryant v. Zimmerman</i> , 278 U.S. 63 (1928)	27
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	25
<i>Commonwealth of Pennsylvania v. Loyal Order of Moose</i> , Lodge No. 107, 448 Pa. 451, 294 A.2d 594 (1972), appeal dismissed, 409 U.S. 1052 (1972) ...	21
<i>Cornelius v. Benevolent Protective Order of Elks</i> , 382 F. Supp. 1182 (D. Conn. 1974)	23
<i>Curran v. Mount Diablo Council of Boy Scouts</i> , 195 Cal. Rptr. 325 (Cal. App. 2d Dist. 1983), juris. statement filed Mar. 14, 1984 (U.S. Sup. Ct. No. 83-1513) ..	5
<i>Daniel v. Paul</i> , 395 U.S. 298 (1969)	23
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	25
<i>Fessel v. Masonic Home of Delaware</i> , 428 F. Supp. 573 (D. Del. 1977)	21
<i>Fitzgerald v. United Methodist Community Center</i> , 335 F. Supp. 965 (D. Neb. 1972)	27
<i>Fletcher v. U.S. Jaycees</i> , No. 78-BPA-0058-0071 (Mass. Comm.'n Against Discrimination, Jan. 27, 1982), on appeal, Mass. Sup. Jud. Ct.	13
<i>Gilmore v. City of Montgomery</i> , 417 U.S. 556 (1974)	4, 7, 8, 9, 14, 22, 23
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1964)	8, 9
<i>Held v. Missouri Pac. R.R.</i> , 373 F. Supp. 996 (S.D. Tex. 1974)	26, 27
<i>Junior Chamber of Commerce of Kansas City, Missouri v. Missouri State Junior Chamber of Commerce</i> , 508 F.2d 1031 (8th Cir. 1975)	13
<i>Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees</i> , 495 F.2d 883 (10th Cir. 1974), cert. denied, 419 U.S. 1026 (1974)	13
<i>Knott v. Missouri Pac. R.R.</i> , 389 F. Supp. 856 (E.D. Mo.), aff'd, 527 F.2d 1249 (8th Cir. 1975)	26

Table of Authorities Continued

	Page
<i>Larson v. Valente</i> , 456 U.S. 228 (1982)	25
<i>League of Academic Women v. Regents of University of California</i> , 343 F. Supp. 636 (N.D. Cal. 1972) ...	26
<i>Mississippi University for Women v. Hogan</i> , 458 U.S. 718 (1982)	27
<i>Moose Lodge No. 107 v. Irvis</i> , 407 U.S. 163 (1972)	4, 8, 20, 23
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958)	9
<i>NAACP v. Alabama</i> , 377 U.S. 288 (1964)	25
<i>New York City Jaycees, Inc. v. The United States Jaycees, Inc.</i> , 512 F.2d 856 (2nd Cir. 1975)	13
<i>Olsen v. Rembrandt Printing Co.</i> , 375 F. Supp. 413 (E.D. Mo. 1974), <i>aff'd</i> 511 F.2d 1228 (8th Cir. 1975)	26
<i>Rackin v. University of Pennsylvania</i> , 386 F. Supp. 992 (E.D. Pa. 1974)	26
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981)	27
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	26
<i>Sullivan v. Little Hunting Park, Inc.</i> , 396 U.S. 229 (1969)	14
<i>Tillman v. Wheaton-Haven Recreational Association, Inc.</i> , 410 U.S. 431 (1973)	13, 23
<i>Troy v. Shell Oil Co.</i> , 378 F. Supp. 1042 (E.D. Mich. 1974), <i>appeal dismissed</i> , 519 F.2d 403 (6th Cir. 1975)	26
<i>United States Jaycees v. Bloomfield</i> , 434 A.2d 1379 (D.C. App. 1981)	13
<i>United States Jaycees v. Richardet</i> , 666 P.2d 1008 (Alaska 1983)	13
<i>Williams v. San Francisco Unified School District</i> , 340 F. Supp. 438 (N.D. Cal. 1972)	27
 CONSTITUTION AND STATUTES:	
Alaska Stat.:	
§ 18.80.230(1)	13
§ 18.80.300(7)	13

Table of Authorities Continued

	Page
Civil Rights Act of 1964, 42 U.S.C. § 2000a	21
D.C. Code § 6-2241(a)(1) (1978 Supp.)	13
Mass. Gen. Laws Ann.:	
ch. 272, § 92A	13
ch. 272, § 98	13
Minnesota Code Ann.:	
§ 64A.44	27
§ 64A.48, subdiv. 4	27
36 U.S.C.:	
§ 23	19
§ 33	19
§ 97	19
MISCELLANEOUS:	
Annot., <i>Civil Rights Act—Private Clubs, Etc.</i> , 8 A.L.R.	
Fed. 634	21, 22, 23
6 Am. Jur. 2d <i>Associations and Clubs</i> § 18 (1963)	23
36 Am. Jur. 2d <i>Fraternal Orders</i> §§ 56, 60 (1968) ...	17, 23
110 Cong. Rec.:	
2294 (Remarks of Rep. Meador)	21
2296 (Remarks of Reps. Williams and Meador)	21
6008 (Remarks of Sen. Humphrey)	21
7404 (Remarks of Sen. Magnuson)	21
<i>Encyclopedia Americana</i> (International Ed. 1983)	18
Gale, <i>Encyclopedia of Associations</i> , 16th Ed. (1982) .11,	17
Kauffman, <i>Faith and Fraternalism</i> (1982)	17, 18
Schmidt, <i>Fraternal Organizations</i> (1980)	18

BRIEF OF CONFERENCE OF PRIVATE ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

INTEREST OF THE CONFERENCE OF PRIVATE ORGANIZATIONS

This brief is presented by the Conference of Private Organizations ("CONPOR") in support of the position of the Appellee, The United States Jaycees. Counsel for both Appellants and Appellee have consented to CONPOR's filing of the instant brief *amicus curiae*.

The Conference of Private Organizations is a coalition of membership associations. Its Board of Directors is composed of leaders of the following organizations:

(i) The Benevolent and Protective Order of Elks is a benevolent, ritualistic and fraternal society with 1,650,000 members in 2,250 lodges. It has a representative government controlled by its members. Its membership is limited to males, of good moral character, who are 21 years of age or older. Members must also express a belief in God, be United States citizens, and live within the jurisdictional limits of the lodge. There are two womens' auxiliaries for the wives and female relatives of Elks members—the Ladies of the Elks, and the Supreme Emblem Club of the United States. These Elks organizations engage in numerous civic and philanthropic programs, all of which provide benefits without regard to the race, creed, sex, ethnic background, or religion of the recipients.

(ii) The Supreme Lodge, Knights of Pythias is also a benevolent, ritualistic, and fraternal society. It has a representative government controlled by its members. It is composed of 140,000 members in 2,000 lodges. It limits its membership to males of sound health and good moral character, who believe in a Supreme Being, and can read and write. Persons in certain occupations (e.g., liquor dealers) are excluded. It is affiliated with a separate sororal society, the Supreme Temple Order of Pythian Sisters,

which has 48,000 women members in 1,027 local units. Both organizations conduct and sponsor civic and philanthropic activities, all of which are made available to persons regardless of race, creed, sex, ethnic background, or religion.

(iii) The Loyal Order of Moose is also a benevolent, ritualistic and fraternal society, with 1.3 million members in 2,250 lodges. Its membership is limited to males who are 21 years of age or older and who believe in a Supreme Being. Members of the Communist Party or convicted felons are not eligible for membership in the Moose. There is also a women's auxiliary, the Women of the Moose, with about 400,000 members. The wives and female relatives of Moose members are eligible for membership in the latter organization. Both organizations offer all their civic and philanthropic benefits to the public on a totally nondiscriminatory basis.

(iv) The Great Council of U.S. Improved Order of Red Men is also a benevolent, ritualistic and fraternal society with 53,616 members in 940 local lodges. Its representative government is controlled by its members. Its membership is limited to males who are United States citizens and believe in a Supreme Being. It is affiliated with a separate organization, the Degree of Pocahontas, whose members consist of women relatives of Red Men members. There are 722 local units of the Degree of Pocahontas. These organizations also offer civic and philanthropic programs to the public on a totally nondiscriminatory basis.

(v) The National Club Association ("NCA") is a Washington, D.C. association, whose membership consists of over 1,000 social clubs throughout the United States with over 900,000 individual members. All of the members of NCA restrict their membership on one or more bases, and some of such member clubs admit only men or only women to membership. Other membership criteria include professional status; religion; economic class; business, literary or other achievements; athletic avocation; social congeniality; and the like.

(vi) The United States Power Squadrons is a membership association whose primary activity consists of providing education on boating and boating safety, and navigation. It has over 50,000 members in about 450 local

groups, who exercise control over its affairs. Prior to 1982, its membership was limited to males 18 years of age or older who were of good moral character, and had demonstrated certain boating knowledge and skills. In 1982, the organization voted to allow women to become members if they satisfied the other qualifications.

(vii) The United States Jaycees is a nonprofit membership association whose purpose is to provide young men with an opportunity for personal development and achievement through participation in the affairs of their community, state and nation. In 1981 it had about 295,000 regular members in about 7,400 local chapters. Its regular members must be male and between 18 and 35 years of age. Only regular members may vote or hold office, but other persons may participate in the other activities of the organization through an "associate membership."

CONPOR was formed in order to defend and protect the fundamental rights of its members, and citizens generally, freely and privately to associate upon such terms and conditions as they shall solely determine. CONPOR promotes this right through participation in judicial cases, providing information to legislative and administrative officials, and through educational activities.

CONPOR's interest in this case arises from the diversity of the membership requirements, limitations and restrictions of its member organizations, and their component units. Some of the component units which it represents limit their membership primarily on the basis of broad objective classifications, such as gender, age, religious belief, or literacy. Other component units primarily rely on subjective membership qualifications, such as congeniality, avocations, social or economic status. Most employ both types of restrictions to one degree or another. We believe that membership associations are protected by the Constitutional right of association in restricting their core membership functions—voting, office-holding, and policymaking—on the basis of either broad, objective classifications such as gender, or on the basis of subjective factors such as congeniality, social status, or the like. Each of these membership policies, if implemented in a bona fide manner, represents a choice which is totally within the discretion of

the association's members, and may not be subject to regulation or control by government.

To allow the State to truncate the Jaycees' membership limitations, merely because it has a broad class-restricted membership limitation, and because it offers some programs to the general public, would create a precedent which would threaten the similar membership limitations used by many fraternal orders, associations and clubs. Such organizations contribute greatly to the unique pluralism and diversity of our country. The rights of individuals to form such associations must not be curtailed by a governmentally dictated "index" of proscribed membership limitations.

SUMMARY OF ARGUMENT

This Court has held that the Constitution prohibits government from interfering with the right of individuals to form associations for the purpose of meeting and conducting activities with respect to economic, religious, cultural or social matters of mutual interest. The Court has recognized that such associations may restrict membership on the basis of broad objective classifications—such as "all white, all black, all brown * * * all yellow, * * * all Catholic, all Jewish, all Gentile, or all agnostic." *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1973), quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-180 (1972) (Douglas, J., dissenting). In addition, Congress and the courts have long recognized the right of individuals to restrict membership in an association on totally subjective bases, for example, through a single-member-veto procedure.

The mandatory order of the Minnesota Commission here grossly violates the associational rights of the U.S. Jaycees. The order not only destroys a principal membership qualification of the U.S. Jaycees in Minnesota, but it allows state and local Jaycees units in Minnesota to continue using the "Jaycees" name and program even if the U.S. Jaycees withdraws from the State. The Minnesota Commission's order is thus in total conflict with the right of genuine membership organizations—of which there are thousands in the United

States—to use as membership qualifications broad, objective class restrictions, such as gender, age, race, religion, national origin, and the like.¹

The Minnesota Commission erroneously refused to recognize the U.S. Jaycees' associational rights on the ground that those rights were forfeited by reason of the Jaycees' vigorous efforts to recruit as regular members all persons who met its gender and age qualifications. But the right of individuals to form restricted-class membership associations may not be curtailed merely because their association solicits new members in one manner or another, or because it enrolls all applicants who meet the objective membership qualifications.

The Minnesota Commission also erred in curtailing the U.S. Jaycees' associational rights on the basis that the local Jaycees' chapters were influential in the Minnesota business community and helpful to the business advancement of members. There is no basis for such a test, and it would be impossible to apply fairly and uniformly. Moreover, it would discourage fraternal, social and civic groups from providing valuable civic and philanthropic services to the community, for fear of increasing their "influence" and being classified as public accommodations. Similarly, membership associations like the Jaycees should not be subject to government regulation on the ground that their education and philanthropic services to the public create an invidiously discriminatory "second class" membership. Such services do not constitute a real "membership"; if these services were treated as such, restricted-class fraternals, clubs and similar associations would have to eliminate or curtail them to the detriment of the community.

¹ The injury to associational rights caused by governmental intrusions upon class restrictions of membership associations such as that here is demonstrated by *Curran v. Mount Diablo Council of Boy Scouts*, 195 Cal. Rptr. 325 (Cal. App. 2d Dist. 1983), *juris. statement* filed Mar. 14, 1984 (U.S. Sup. Ct. No. 83-1513). There the California court held that the Boy Scouts of America had no right to restrict homosexual men from serving as Scout leaders.

Nor may the restricted-class membership bond of the U.S. Jaycees be destroyed by government on the ground that it is unrelated to the speech and advocacy conduct of that organization. The freedom-of-association guarantee is not limited to speech and advocacy, but protects individuals in forming associations and providing all manner of mutual cultural, legal, economic and religious benefits to members. In any event, speech and advocacy activities of membership associations typically are intertwined with their core membership restrictions, and government has no right to decide whether changing the membership restrictions would or would not alter the association's philosophy or positions on issues.

The Minnesota Commission has fundamentally erred in confusing characteristics and rights of a "purely private" association, with the characteristics and rights of a restricted-class membership association like the U.S. Jaycees. "Purely private" associations must be governed by their membership, and may maintain their exclusive membership on the basis of any standard they choose, be it rational or arbitrary. A restricted-class membership association is similarly member-controlled, but need not exclude applicants on the basis of subjective factors as long as it uniformly applies its class restrictions. The approach of the Minnesota tribunals would extinguish restricted-class membership associations. Most of the organizations represented by CONPOR are restricted-class membership associations, as well as purely private membership associations.

Even if certain programs of the Jaycees may be construed to constitute a public accommodation because those particular activities are open to the public, the Minnesota Commission erred in opening up the U.S. Jaycees' core membership functions—voting, office-holding, and policymaking—to women. Requiring the U.S. Jaycees to admit women to its governing councils is not appropriate relief in a public accommodations case, and severely infringes its basic associational rights.

The Minnesota Commission's order eliminating the single-gender membership limitation of the U.S. Jaycees does not have the requisite paramount importance, and is not narrowly tailored to avoid the unnecessary stifling of associational rights. Most importantly, the Commission has not demonstrated why the gender limitation of the U.S. Jaycees must be eradicated at the same time that the Commission avows that gender limitations of other similar associations will not be disturbed. There is no merit to the State Commission's attempt to apply the prohibition on "separate but equal" racially discriminatory schools to single-gender membership associations. Racial discrimination in education is subject to legal and Constitutional principles entirely different from gender restrictions in voluntary associations.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY HELD UNCONSTITUTIONAL THE COMMISSION'S MANDATORY ORDER REQUIRING THE JAYCEES TO ADMIT WOMEN TO ITS INTERNAL GOVERNING AND VOTING PROCESSES

A. Government Is Prohibited by The Freedom-Of-Association Guarantee From Interfering With The Class Membership Restrictions Of Voluntary Associations.

In *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1973), this Court held that governments were strictly limited in the actions which they could take against restricted-membership groups—even if those groups discriminated on the basis of race. The Court specifically concluded that such a group could not be excluded from access to a public park merely because it had an "all-Negro, all Oriental, or all-white" membership policy. *Ibid.*

In so holding, the Court quoted with approval (*ibid.*) the rationale of Justice Douglas' dissenting opinion in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-180 (1972):

The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

The *Gilmore* opinion went on to explain why freedom of association should protect such restricted-membership groups, stating that (417 U.S. at 575):

The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.

The duty of governments to refrain from interference with the internal membership processes of voluntary organizations has been equated with the immunity of the marital relationship from governmental regulation mandated by the freedom-of-association guarantee. In *Griswold v. Connecticut*, 381 U.S. 479, 483-484 (1964), this Court overturned state laws regulating the use of contraceptives by married couples, stating that (*id.* at 483):

* * * [W]e have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members.

* * *

The right of "association," like the right of belief * * *, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly in-

cluded in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

The Court's rationale in *Griswold* relied on *NAACP v. Alabama*, 357 U.S. 449 (1958). There a state had brought an action to banish from its boundaries an organization which it deemed inimical to the public welfare, and had obtained an order requiring disclosure of membership lists. This Court viewed the disclosure order as an indirect attempt to suppress the activities of the association, and held that the order was barred by the freedom-of-association guarantee (*id.*, 357 U.S. at 460-461):

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process clause of the Fourteenth Amendment, which embraces freedom of speech.

Of course, *it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters*, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. [Emphasis added.]

B. The Mandatory Order Of The Minnesota Commission Grossly Intrudes Upon The U.S. Jaycees' Constitutional Right To A Restricted-Class Membership Association.

In the instant case, the Minnesota Commission below has not merely sought to deny a restricted-membership association access to public facilities, as in *Gilmore, supra*. Instead, it has imposed a severe governmental restriction upon the associational rights of the U.S. Jaycees, issuing a mandatory order prohibiting the U.S. Jaycees from continuing in Minnesota their all-male associational bond. (J.S. App. A-108.)² Indeed,

²"J.S. App. ____" references are to the Appendix to Appellants' Jurisdictional Statement.

the mandatory order goes even further and deprives the national Jaycees organization of the right to withdraw from Minnesota, or to protect its integral associational character and rights in that State. For the order prohibits the U.S. Jaycees from "Revoking the charter of any Jaycee local organization * * * or state organization member * * * or denying any privilege or right of membership * * * because either [state or local organization] extends to women all the rights and privileges of * * * membership." (*Ibid.*)

The scope of the Minnesota Commission's intrusion into the associational rights of an indisputedly genuine membership organization is truly astounding. This Court's opinion in *Gilmore* recognized that the right of individuals to form and participate in associations with restricted-class memberships of all kinds is guaranteed by the Bill of Rights. Judge Arnold noted below (J.S. App. A-29) that "there are hundreds of private (in the sense of nongovernmental) associations in this country whose membership is limited to men or to women." For government to require all-black groups such as Prince Hall Masonry to accept whites, or all-Norwegian organizations such as the Sons of Norway to accept non-Norwegians, or all-female Jewish organizations such as Hadassah to accept male Gentiles, would seriously curtail associational rights, and would deprive the Nation of the diversity which is part of its strength and heritage. The U.S. Jaycees is similarly protected by the Constitution in seeking to continue the all-male character of its association.

The Minnesota tribunals were led to their intrusion on rights of association by a boundless extension of the law of public accommodations, to the extent that it totally overrode the First Amendment protections of genuine membership associations. Their rationale was improper for a number of reasons.

1. **The manner or size of membership recruitment does not destroy the associational rights of a restricted-class membership organization.**

The Minnesota State tribunals initially erred by dwelling at length on the vigorous efforts of the U.S. Jaycees to obtain new

members, and by concluding therefrom that the U.S. Jaycees had no restricted-membership policy protected by freedom of association, but were rather engaged in the commercial business of selling memberships. Such a rationale severely curtails the rights of association of restricted-class membership associations recognized by this Court. The freedom of association guarantee at least includes the right of association members to persuade persons who meet membership requirements to join the association. The Commission's order restricts this right in an unreasonable manner.

The U.S. Jaycees is far from unique in having a large nationwide membership, which it vigorously seeks to expand, within the confines of its restricted-class membership qualifications. There are hundreds of large organizations in this country which have single-gender membership restrictions, and hundreds more which have racial, national origin, religious, or other like membership restrictions.³ (See J.S. App. A-29.) So long as associations are genuine bona fide membership organizations, and confine their recruiting within their objective

³ For example, in addition to the CONPOR organizations, Gale, *Encyclopedia of Associations* (16th ed., 1981) lists the following large single-gender national organizations:

Prince Hall Masonry: all black males, of the Protestant or Jewish faith, with 400,000 members;

Knights of Columbus: all male practical Catholics, with 1.2 million members;

Hadassah, The Womens Zionist Organization of America: all Jewish females, with 370,000 members;

B'nai B'rith Women: all Jewish females with 150,000 members;

National Association of Women's Clubs: all black females, with 45,000 members;

P.E.O. Sisterhood: all females, with 212,000 members;

Improved Benevolent Protective Order of Elks of the World: black males, with 450,000 members;

Association of Jewish Leagues: all females between ages of 18 and 42, with 1.3 million members;

General Federation of Womens Clubs: all females, with 500,000 individual members represented;

membership restrictions, there is no basis for destroying their membership qualifications under the guise of public accommodations law. Indeed, it would be impossible to draw a line between permissible and impermissible types or sizes of recruiting campaigns for such organizations. One organization may solicit prospects door to door; another may phone persons with ethnic-sounding surnames; and another may place notices in religious or ethnic newspapers—the manner and vigor of the recruitment are irrelevant for purposes of the freedom-of-association guarantee.

The membership recruiting of the U.S. Jaycees is not unlike the practices or other restricted-class membership associations, such as national fraternal and service organizations. Its membership campaigns do not constitute a commercial business of selling services, for recruiting is strictly limited to males between the ages of 18 and 35. Indeed, if the U.S. Jaycees were merely a commercial business, it would hardly have expended hundreds of thousands of dollars in litigation fees, in courts throughout the country, defending its purpose and right not to engage in the allegedly lucrative "sale" of

Altrusa: all females, with 20,000 individual members represented.

An informal survey of Minnesota associations indicates that those with membership limited to females have over 40,000 members. They include business and professional groups (e.g., the Alliance of Women in Architecture, Council of Railroad Women, and Women's Writing Guild); all female religious groups (e.g., the Lutheran Church Women, Baptist Women's Council, Catholic Women's Group, B'nai B'rith Women, Christian Women's Fellowship, Church Women United, Hadassah (Jewish), Mizradi Women's Organization, the Eastern Star (composed of Master Masons and female relatives only), and the American Atheist Women); and ethnic organizations (e.g., the Italian American Women, Philippine-American Women, Polish Women of the United States, Baltic Women's Council, Slovak Women's Union, and Women's auxiliaries of such groups as the Sons of Norway and the Sons of Italy).

memberships to women.⁴ Nor would it refrain from so-called "sales" of memberships to men over 35.

The associational rights guaranteed by the Bill of Rights protect all genuine, bona fide membership organizations, not just organizations which have ineffective or unorganized or minimal recruiting programs. So long as the membership recruiting is confined within an association's objective membership restrictions, the recruiting may not be held equivalent to a commercial business for freedom-of-association purposes.⁵

⁴ See *Junior Chamber of Commerce of Kansas City, Missouri v. Missouri State Junior Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975) (receipt of federal funds (a practice since discontinued) does not make Jaycees a governmental actor for purposes of the Fifth Amendment); *New York City Jaycees, Inc. v. The United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975) (same); *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*, 495 F.2d 883 (10th Cir.), cert. denied, 419 U.S. 1026 (1974) (same); *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. App. 1981) (Jaycees is not a "place of public accommodation" within the meaning of the D.C. Human Rights Act of 1977, D.C. Code § 6-2241(a)(1) (Supp. 1978)); *United States Jaycees v. Richardet*, 666 P.2d 1008 (Alaska 1983) (Jaycees is not a public accommodation under Alaska law, Alaska Stat. §§ 18.80.230(1), .300(7)); *Fletcher v. U.S. Jaycees*, No. 78-BPA-0058-0071 (Mass. Comm'n Against Discrimination Jan. 27, 1981) (Jaycees is a place of public accommodation within the meaning of Mass. Gen. Laws Ann. ch. 272, §§ 92A, 98), on appeal, Mass. Sup. Jud. Ct.

⁵ The community swimming pool cases are consistent with this principle. In those cases, the courts determined that the memberships were in fact offered and sold to the entire population living within the natural geographic marketing area of the pool, yet blacks living in that area were solely and arbitrarily excluded. The courts held that such exclusion was a "badge of slavery" prohibited by legislation implementing the Thirteenth Amendment, that the exclusion represented denial of a valuable property right protected by those provisions, and that blacks meeting the geographical and other qualifications for membership must be admitted. E.g., *Tillman v. Wheaton-Haven Recreational Assn., Inc.*, 410 U.S. 431, 438 (1973);

2. A restricted-class membership association's influence and involvement with the community does not give rise to public status.

The Minnesota tribunals similarly erred in attempting to justify State regulation of the U.S. Jaycees' internal membership policies on the basis of a quasi-state-action analysis. Of course, the Eighth Circuit and other courts of appeals had previously held that the U.S. Jaycees was not an instrumentality of government by reason of its tax exemptions and other limited governmental contacts.⁶ The Minnesota State tribunals nonetheless advanced a variant of that argument, contending that the U.S. Jaycees somehow loses its right to a restricted-membership policy because its membership programs might advance the individual business interests of its members. Under such a theory, this Court's rationale in *Gilmore v. City of Montgomery*, *supra*, that government may not interfere with restricted-class membership associations, would have to be limited to restricted-class membership associations *so long as they do not advance their members' business interests*. If membership in the association was determined to provide some unspecified degree of help to the members' business careers, the association would be declared "public" and presumably anyone could become a member.

The unsoundness of such a rationale is self-evident, and is demonstrated by the opinions of the State tribunals below. The Kiwanis International association has an all-male membership policy like that of the U.S. Jaycees. (J.S. App. A-38—A-40.) Yet presumably because membership in Kiwanis International in Minnesota is not viewed as so necessary to business

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). Here, by contrast, the Thirteenth Amendment and 42 U.S.C. § 1981 are not implicated (see note 12, *infra*), and there is no offering of memberships to the entire public. Moreover, it is undisputed that blacks and other minority males between the ages of 18 and 35 are legally entitled to become members of the Jaycees.

⁶See note 4, *supra*.

advancement as membership in the U.S. Jaycees, Kiwanis International is not regarded as a public accommodation by the State. (J.S. App. A-83, A-122—A-123.)

It is clear that such a line between permissible and impermissible restricted-class membership organizations would severely denigrate constitutional rights of association, and would be impossible to apply rationally and fairly. Moreover, such a test would lead to varying results within the same association. For example, the U.S. Jaycees would be classified a "public accommodation" in Minnesota where its activities were strong and influential, but would have to be viewed as "private" in states where it had less influence. Such varying results would create havoc with the membership policies of national membership associations. Any such test would severely infringe the freedom of association of such groups, by imposing pressure for them to impose arbitrary limitations on their size or influence in any one area.

Basing allowance of membership restrictions on business or other community influence or prestige would have consequences severely detrimental to the public welfare. Inherent in such a test is the proposition that membership associations must limit their involvement in business and community affairs as the price of retaining class membership restrictions. Such a rule would strike at a central purpose of fraternal organizations such as those in CONPOR—the Elks, Moose, Knights of Pythias, and Red Men—as well as civic and service organizations. These and similar fraternal (and sororal) societies were created to form a fraternal spirit out of which would flow service for the community and for charity. That goal has been enormously successful, and the civic and philanthropic service of fraternal and sororal now amount to hundreds of millions of dollars a year. For example, in the fiscal year ended March 31, 1983, the contributions of the Elks for such purposes were valued at \$53.4 million.

These activities necessarily involve members of fraternal quite deeply in their business and civic communities. Under the Minnesota tribunals' rationale, such involvement and in-

fluence would lead to public accommodations status, and the loss of ability to enforce class membership restrictions.

3. **Membership associations do not lose their right to maintain restricted-class membership qualifications by making certain programs or facilities available to the general public.**

The Minnesota tribunals additionally erred in interfering with the membership policies of the U.S. Jaycees under the guise of eliminating "second class" membership status for women. The fact that women are allowed to participate in some of the U.S. Jaycees' programs does not mean that they must be admitted to the core internal membership processes of the U.S. Jaycees. On occasion, some fraternal organizations and social clubs allow parts of their facilities to be used by civic, educational, philanthropic and other public groups. They also provide educational, charitable, civic and other service programs to the public. But outside groups do not become "second class" members by reason of such programs. Communities would suffer greatly if private social clubs could not offer programs to the public—such as allowing the local Red Cross to use the swimming pool on occasion to give lifesaving courses—for fear of losing restricted-class membership status.

Fraternal, social clubs, and civic and service organizations thus commonly sponsor specific programs open to the general public. Of course, they may not discriminate in providing such programs. But sponsorship of such programs should not destroy their right to maintain their restricted-class membership policies for strictly member functions.

4. **The associational rights of membership organizations are not limited to activities expressly enumerated in the First Amendment.**

The dissenting judge below would hold that the freedom-of-association guarantee is limited to activities specifically enumerated in the First Amendment. He would deny application of that guarantee here on the ground that the male-only membership restriction has "no relationship" to the U.S. Jay-

cees' speech and advocacy, and "does not enhance the effectiveness of the * * * [Jaycees'] type of advocacy * * *." (J.S. App. A-45.) This position is erroneous for two reasons.

First, it ignores this Court's rationale in *Gilmore v. City of Montgomery*, *supra*, and other cases, that freedom of association protects the formation and membership functions of a membership association from unwarranted governmental regulation. Nothing in those cases, and lower court cases which have followed them, has narrowly limited freedom of association to the types of conduct specifically enumerated in the First Amendment. For example, there is no reason why the membership restriction of the B'nai B'rith Women—an all-female Jewish organization⁷—should be given greater constitutional protection than the all-female restrictions of secular sororal societies, simply because free exercise of religion is specifically enumerated in the First Amendment.

Secondly, specific proof of a nexus between membership restrictions and the communications activities of a membership association is not necessary, because such communication is inherently linked to the essential character of the association, and that character is a product of its membership restrictions.⁸ As the majority opinion below stated, "An organization of young people, as opposed to young men, may be more 'felicitous,' more socially desirable, in the view of the State Legislature, or in the view of the judges of this Court, but it will be substantially different from the Jaycees as it now exists." (J.S. App. A-24—A-25.)⁹

⁷ Gale, *Encyclopedia of Associations*, *supra*, at 1117.

⁸ A class restriction on membership is a prerequisite to and distinguishing characteristic of a fraternal society. 36 Am. Jur. 2d *Fraternal Orders, Etc.* § 56 (1968).

⁹ The interweaving of the peculiar philosophy of a fraternal association and its gender restriction is similarly explained in Kauffman, *Faith & Fraternalism* 124 (1982):

The Massachusetts Catholic Order of Foresters admitted women on an equal footing with men. Had the Knights of Columbus followed suit, it would have entailed a drastic alteration of its

For example, fraternal societies were typically established by working men for two purposes: (1) to provide an organizational framework for social events which would build fraternal spirit; and (2) out of such spirit to develop and implement mechanisms to provide for the members' wives and children, through insurance, self assessments, philanthropy, and other means. As fraternals became established, they typically also provided financial and other support for various charitable programs for nonmembers. Women's auxiliaries were usually established to enable members' wives to conduct their own social and philanthropic programs, and often children's auxiliaries were also established.¹⁰

As the literal meaning of the word "fraternal" indicates, such associations have generally been limited to men. However, similar sororal societies, based on a like spirit of kinship, sociability and mutuality, and carrying out comparable, but distinct, benevolent, social and philanthropic programs, exist for women.

character. Traditional notions of the male role permeated every aspect of Columbian fraternalism. The ceremonial "rite of passage" was intended to imbue the member with a "manly" sense of pride in his Catholicism and a strong dedication to defend the faith. The insurance program was a medium for expressing the breadwinner's economic responsibility for his family. The K. of C. council was a place where Catholic men could find social sustenance for their struggle as a minority group within a hostile society and where they could unite in the militant promotion of Catholic interests. * * * This identification with masculinity was so strong that the resolution admitting women into the Order never reached the floor of the National Council, either in 1895 or at any subsequent meeting. * * *

Ladies' auxiliaries to various councils did emerge in the late 1890s. Though they were never absorbed as members of the K. of C., some of these auxiliaries were active in the social life of the local councils.

¹⁰ See, e.g., Kauffman, *supra*, at 8-9; Schmidt, *Fraternal Organizations*, 16-20 (1980); 36 Am. Jur. 2d *Fraternal Orders* § 2 (1968); 12 *The Encyclopedia Americana*, "Fraternal Societies," 19-20 (Int'l Ed. 1983).

Social clubs also depend heavily on common bonds among members to achieve their purposes. The essence of a club is restricted membership based on an infinite variety of common traits, such as background, religion, economic status, recreational interests, etc. Because men and women members often perceive that they have different interests and objectives, club membership is frequently all-male or all-female. Class restrictions of this type are often thought to be essential for achieving the goals of a social club, such as fellowship, and mutual enjoyment of recreational activities.

However foolish it may seem to some, it is widely believed by members of some fraternals and clubs that the roles of men and women in society are different, and that the organizations through which men and women strive for personal development should reflect that difference. As times have changed, this philosophy is undoubtedly less universal than it once was. Nevertheless, that philosophy still plays an important role in the lives of millions of "traditional" families. This philosophy inspires such fraternals and clubs to provide civic, public, eleemosynary and social benefits which contribute significantly to the common weal. The expression and practice of this philosophy through the selective common bonds of organizations such as clubs and fraternal orders are as deserving of protection under the freedom-of-association guarantee as the communications activities of such organizations.

Congress itself has frequently recognized the role of single-gender associations in promoting the public welfare, chartering numerous associations with such a restriction. E.g., American War Mothers, 36 U.S.C. § 97 (membership "limited to women" with children in Armed Forces); the Boy Scouts of America, 36 U.S.C. § 23 (purpose "to promote the ability of boys to do things for themselves"); and the Girl Scouts of America, 36 U.S.C. § 33 (purpose "to promote * * * [named] virtues among girls").

Similarly in the instant case, the Jaycees' expressions of positions on political, economic and social matters do not spring full blown from a representative cross-section of the population

at large. Instead, the U.S. Jaycees' positions are inherently a product of the common bond among the members, which includes the restrictions on voting, policymaking and leadership by certain age groups and by women. Government has no right to interfere with the U.S. Jaycees' philosophy and the associational common bonds which implement it. Indeed, government has no right to decide whether or not a change in the U.S. Jaycees' core membership restrictions would involve a change in the association's philosophy. That is solely the right of the U.S. Jaycees' members to determine, through that association's established national internal governmental procedures.

5. Admitting the public to the internal membership processes of an association is not a proper remedy in a public accommodations proceeding.

The Minnesota tribunals also erred by confusing the U.S. Jaycees' programs and services which are open to the general public, and its core membership functions—voting, office-holding, and policymaking—which are limited to males between the ages of 18 and 35. It is of course undisputed that the U.S. Jaycees offers many civic and philanthropic programs to the general public. However, participation in these programs is sharply distinguished from the core internal membership functions, in which only regular members—those satisfying the class membership restrictions—are eligible to engage.

This Court has explicitly recognized the distinction between these essential membership privileges, and organizational services or programs open to the general public. In *Moose Lodge No. 107 v. Irvis*, *supra*, the Court sharply differentiated between a black individual's claim to access to a fraternal lodge's restaurant and bar which was open to all white male guests of members, and his claim to the full membership privileges in the lodge and order which were not generally open to whites. In a subsequent state case, after this Court denied the black individual's standing to challenge such membership privileges, the Pennsylvania Supreme Court recognized a similar distinction. It held that the Pennsylvania public accommodations law required desegregation of the local lodge's restaurant

and bar, but did not require the admission of black individuals to full membership privileges in the lodge. *Commonwealth of Pennsylvania v. Loyal Order of Moose, Lodge No. 107*, 448 Pa. 451, 460, 294 A.2d 594 (1972), *appeal dismissed*, 409 U.S. 1052 (1972).

This distinction between the programs of a membership association generally open to the public, and those internal membership processes which are available only to a restricted class of individuals, is recognized in the language and legislative history of the federal public accommodations statute, 42 U.S.C. § 2000a(e). That statute provides that a private club is subject to the public accommodations law only "to the extent" its facilities are open to the public. The legislative history of the Civil Rights Act of 1964 evinces Congress' unmistakable intent to limit nondiscrimination orders to those areas and programs of clubs and fraternal orders which had been generally open to whites, but not to overturn membership, voting and other restrictions which excluded substantial numbers of whites as well as blacks.¹¹

Where an association has operated a restaurant or bar or other similar facility open to the public, desegregation orders have virtually always been limited to such public facility. The courts have not required that blacks be allowed to participate in governing the association—in voting, policymaking, and officeholding.¹²

¹¹ 110 Cong. Rec. 7404, 7407 (remarks of Sen. Magnuson); 110 Cong. Rec. 6008 (remarks of Sen. Humphrey); see also 110 Cong. Rec. 2294 (remarks of Rep. Meador); 110 Cong. Rec. 2296 (remarks of Reps. Williams and Meador).

¹² See generally Annot., *Civil Rights Act—Private Clubs, Etc.*, 8 A.L.R. Fed. 634 (1971); see generally *Fessell v. Masonic Home of Delaware*, 428 F. Supp. 573 (D. Del. 1977) (distinguishing, for purposes of applying the "private club" exception to Title VII of the 1964 Civil Rights Act, between the Masons organization itself and a nursing home run by the Masons).

Only where voting and ownership of membership interests have been shown to have been open to all whites, and to constitute an

Just as the public has not been admitted to the internal membership functions where a claimed purely private club was involved, there is similarly no basis for admitting the public to the internal membership functions of a restricted-class membership association like that here. All of the Jaycees programs open to the public are currently open to women. To admit women to the Jaycees' internal voting, office-holding and policymaking functions destroys its associational rights as an all-male restricted-class membership organization—the type of entity protected by the right of association (*Gilmore v. City of Montgomery, supra*). The Minnesota Commission's order in effect holds that an organization which is determined to be a public accommodation must not only provide services to the public, but must also offer the public ownership and governing privileges. Such relief is totally in conflict with associational rights.

6. The Minnesota tribunals erred in confusing the standards for a restricted-class membership association with the standards for a "truly private" club.

By emphasizing the uniform and broad membership classifications of associations such as the Jaycees, Elks, Moose, Altrusa, and B'nai B'rith Women, we do not mean to suggest that those are the only types of restrictions protected by the freedom-of-association guarantee. In addition, there are also the more specific, tailored and subjective restrictions common-

important benefit in and of themselves, have courts ordered blacks to be accorded access to such governmental and ownership rights. Most of the latter cases have involved community swimming pools and similar recreational facilities, where access to the facilities was inextricably bound up with ownership of property and contract rights, and whose membership rights were open to the public living in a certain area, except for blacks. (See footnote 5, *supra*.) As noted above (*ibid.*), here it is clear that the class membership restriction of the Jaycees is genuine and is not a subterfuge to exclude a few minority individuals.

ly employed by "truly private"¹³ or "purely private"¹⁴ social clubs and individual fraternal lodges. Such restrictions include, for example, social status, business affiliations, family background, or even personal grooming. These qualifications need not be rational and may be inconsistently applied, for they represent purely social choices of the members. It is for this reason that truly private fraternal orders and social clubs have been held to be free to set whatever membership requirements they choose, and to administer them as they please. See generally 36 Am. Jur. 2d *Fraternal Orders, etc.* § 60 (1968); 6 Am. Jur. 2d *Associations and Clubs* § 18 (1963).

The two tests for a truly or purely private club are (1) the selectiveness or exclusiveness of the association's choices of members; and (2) the degree of influence exercised by the members over the association.¹⁵ Related factors include the existence of formal membership procedures, the existence of a true fraternal or social purpose, the presence of dues and initiation fees, limitations on the size of the membership, limitations on nonmember use, the sharing of common characteristics by the members, the observance of formalities of organization and control, and the like.¹⁶

The standards for an "all-Black, all-Oriental, or all-white,"¹⁷ or similar restricted-class organizations, as discussed in the preceding sections, are thus different from those for the "truly private" or "purely private" club. The solely restricted-class association must be uniform in applying its membership quali-

¹³ See *Tillman v. Wheaton-Haven Rec. Asso.*, 410 U.S. 431, 438 (1973).

¹⁴ See *Moose Lodge No. 107 v. Irvis*, *supra*, 407 U.S. at 179, fn.1 (Douglas, J., dissenting).

¹⁵ E.g., *Daniel v. Paul*, 395 U.S. 298, 301-302 (1969); *Cornelius v. Benevolent Protective Order of Elks*, 392 F. Supp. 1182, 1203-1204 (D. Conn. 1974) (3-judge ct.); see generally, Annot., *Civil Rights Act—Private Clubs, Etc.*, 8 A.L.R. Fed. 634, 640-653 (1971).

¹⁶ Annot., *supra*, 8 A.L.R. Fed. at 634-667.

¹⁷ *Gilmore v. City of Montgomery*, *supra*, at 575.

fications in order to maintain such restrictions. The truly private club may be as inconsistent as it chooses in applying its membership qualifications, and even employ an arbitrary single-member-veto procedure. Of course, it is possible for an association to be both class-restrictive and purely private—most local lodges of fraternal organizations would satisfy both tests. Indeed, most of the associations represented by CON-POR are both restricted-class membership associations and truly or purely private associations.

The Minnesota tribunals and the district court below confused these two standards, and consequently ordered the end of the all-male class restriction on the grounds that the Jaycees was not purely private. But that is not the issue in the instant case; the issue here is the right of a restricted-class membership organization to maintain a gender-restricted membership policy.

It is obvious that the State tribunals' standard would lead to the destruction of many restricted-class associations which are not "truly private." For example, any "practical" male Catholic over 18 years of age is eligible to join the Knights of Columbus, without being subject to any other membership qualification. The absence of a truly private membership selectiveness does not mean that this organization must admit the general public. Similarly here, the U.S. Jaycees' freedom-of-association rights to a restricted-class membership are not forfeited merely because it may not be a purely private club.

Even if the Jaycees were held not to be a purely private association, this would not mean that it failed to meet the standards of a restricted-class association. The membership requirements of each type of association are entitled to protection under the freedom-of-association guarantee. If restricted-class membership associations were subject to redrafting of their membership policies by government bureaucrats or by the courts, they would eventually lose their unique identity and singular vigor, and eventually become moribund. Such a result would deal a needless and harmful blow to the rich traditions of pluralism and fraternal benevolence which are bulwarks of our Nation.

II

**THE MINNESOTA COMMISSION HAS SHOWN NO
COMPELLING PURPOSE FOR ITS MANDATORY ORDER
WHICH SEVERELY ABRIDGES THE U.S. JAYCEES'
ASSOCIATIONAL RIGHTS**

Where a governmental action like the mandatory order here will curtail the freedom to associate, that action will be subject to the "closest scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). The Commission may not satisfy this burden by showing merely a "legitimate state interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Instead, the Commission bears the burden of demonstrating that the governmental interest sought to be advanced is "paramount" and "of vital importance." *Buckley v. Valeo*, *supra*, at 33. Moreover, the Commission must also demonstrate that its governmental purpose cannot be achieved by more narrowly suited means which do not broadly stifle fundamental personal liberties. *NAACP v. Alabama*, 377 U.S. 288, 307 (1964); see *Larson v. Valente*, 456 U.S. 228 (1982).

In the instant case, the court of appeals correctly held that the Commission had not satisfied its burden. (J.S. App. A-23—A-31, A-36—A-37.) The statute sought to be enforced was mainly aimed at discrimination by traditional public accommodations such as inns and restaurants, and there were no legislative or judicial findings that all-male clubs prevented women from obtaining the business skills which they need to advance professionally. (J.S. App. A-28—A-29.) In fact, the Commission and the State Supreme Court have implicitly urged a policy which would permit other all-male (and all-female) civic and service clubs—such as Kiwanis International—to continue their gender membership restrictions. (See J.S. App. A-29.) Indeed, it is clear that there are numerous other civic and service associations, many of which are open to women only, or to both men and women; the State made no showing that these other associations could not provide businesswomen with comparable membership benefits.

The minimal or nonexistent benefit to gender equality furthered by the Commission's order is decidedly outweighed by the order's severe abridgment of the U.S. Jaycees' associational rights. The order emasculates the essential character of the U.S. Jaycees, imposes a sanction of banishment from the State, and even deprives the national organization of the right to prevent nonaffiliated associations from operating under the "Jaycees" name.

The Commission's reliance on racial discrimination cases to support the alleged compelling character of its prohibition on gender restriction is misplaced. The prohibition on "separate but equal" schools, which the Minnesota Commission attempts (Br. 26) to apply to voluntary membership associations, has no place in this context. The ban on separate-but-equal schools arises from the compulsory nature of public schooling, and barriers to educational development inherent in such separation. Because racially discriminatory *private* schools undermine racially nondiscriminatory *public* schools, and the Thirteenth Amendment specifically authorizes the elimination of private racial discrimination in certain contexts, the freedom-of-association guarantee has been interpreted as narrowly as possible in the context of racially discriminatory private schools. E.g., *Bob Jones University v. United States*, 103 S.Ct. 2017 (1983); *Brown v. Dade Christian Schools*, 556 F.2d 310, 323, 324 (5th Cir. 1977) (en banc) (Goldberg, J., concurring); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). In contrast, the Thirteenth Amendment does not apply to gender classifications,¹⁸ and gender-restricted fraternals and clubs

¹⁸ In *Runyon v. McCrary*, 427 U.S. 160, 167 (1976), this Court stated, "[These cases] do not present the question of the right of a private school to limit its student body to boys [or] girls . . . since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity." Accord, *Knott v. Missouri Pac. R.R.*, 389 F. Supp. 856 (E.D. Mo.), *aff'd*, 527 F.2d 1249 (8th Cir. 1975); *Rackin v. University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974); *Troy v. Shell Oil Co.*, 378 F. Supp. 1042 (E.D. Mich. 1974), *appeal dismissed*, 519 F.2d 403 (6th Cir. 1975); *Olsen v. Rembrandt Printing Co.*, 375 F. Supp. 413 (E.D. Mo. 1974), *aff'd*, 511 F.2d 1228 (8th Cir. 1975); *Held v. Missouri Pac.*

have often been viewed as beneficial to society.¹⁹ The Minnesota Commission has no expressed policy of attempting to outlaw all or most gender-restricted membership associations.

The entire civil rights jurisprudence of this country demonstrates that governments have the power to prohibit racial discrimination in many circumstances where sex restrictions are permitted. For example, government-sponsored racial discrimination is subject to a "strict scrutiny" which amounts to a virtual *per se* prohibition. On the other hand, government-sponsored sex discrimination will be permitted if a legitimate and important governmental object substantially related to the discrimination can be demonstrated. E.g., *Rostker v. Goldberg*, 453 U.S. 57, 67, 78-79 (1981); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). The Thirteenth Amendment and implementing laws (42 U.S.C. §§ 1981, 1982), which broadly bar racial discrimination in contractual and property transactions among private parties, do not apply to sex discrimination.²⁰ The federal Civil Rights Act, 42 U.S.C. § 2000a, prohibits racial discrimination, but not sex discrimination, in public accommodations.

In sum, the Minnesota Commission has demonstrated no significant governmental purposes in subjecting true membership organizations like the U.S. Jaycees to classification as a "public accommodation." By contrast, the U.S. Jaycees has shown that the Commission's order would require the Hobson's choice of leaving the State, or subjecting its essential

R.R., 373 F. Supp. 996 (S.D. Tex. 1974); *League of Academic Women v. Regents of Univ. of Cal.*, 343 F. Supp. 636 (N.D. Cal. 1972); *Williams v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972); *Fitzgerald v. United Methodist Community Center*, 335 F. Supp. 965 (D. Neb. 1972).

¹⁹ See, e.g., *Bryant v. Zimmerman*, 278 U.S. 63, 75-76 (1928); see Minn. Code Ann. §§ 64A.48, subd. 4, 64A.44, which expressly exempt fraternal beneficiary associations from all non-real estate taxes levied for state, county or municipal purposes.

²⁰ *Supra*, note 18.

character to a fundamental transmutation. The interest of the State is thus slight, or nonexistent, while the U.S. Jaycees' constitutional rights would be severely curtailed.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

LEONARD J. HENZKE, JR.

Attorney

LEHRFELD & HENZKE, P.C.

1301 Pennsylvania Avenue, N.W.

Suite 1110

Washington, D.C. 20004

Telephone: (202) 659-4772

Counsel for Amicus Curiae

Conference of Private Organizations

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No. 83-724

ALEXANDER E. STEVAS.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

GOMEZ-BETHKE,

Petitioner,

v.

UNITED STATES JAYCEES,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF FOR THE NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., AMICUS CURIAE
IN SUPPORT OF PETITIONER**

JACK GREENBERG

BETH J. LIEF*

JUDITH REED

16th Floor

99 Hudson Street

New York, N.Y. 10013

Attorneys for Amicus

* Counsel of Record

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Interest of Amicus Curiae	1
ARGUMENT	
I. THE UNITED STATES JAYCEES DO NOT FALL WITHIN THE ZONE OF PRIVACY WHICH RENDERS PRIVATE CLUBS AND ORGANIZATIONS IMMUNE FROM GOVERNMENT REGULATION ..	3
II. THE STATE HAS A LEGITIMATE AND SUBSTANTIAL INTEREST IN SECURING FOR WOMEN THE SAME OPPORTUNITIES AND ADVANTAGES PRIVATE ORGANIZATIONS OFFER MEN	11
CONCLUSION	18

TABLE OF AUTHORITIES

Page

Cases:

Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974)	6
Daniel v. Paul, 395 U.S. 298 (1969)	4
McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1959)	16
Nesmith v. Y.M.C.A., 397 F.2d 96 (4th Cir. 1968)	4
N.Y. City Jaycees, Inc. v. The U.S. Jaycees, Inv., 512 F.2d 856 (2d Cir. 1975)	7
Sullivan v. Little Hunting Park, Inc., 396 U.S. 299 (1969)	3
Sweatt v. Painter, 339 U.S. 629 (1959)	16
Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945)	10
Wright v. Cork Club, 315 F. Supp. 1143 (1970)	4

Statutes:

42 U.S.C. § 2000(a)	12,13
42 U.S.C. §§ 3601-3619	13
15 U.S.C. §§ 1691, 1691(a)-1691(f) ..	13

Other Authorities

Baltzell, The Protestant Establishment (1964)	12
Berry, "New Assaults Coming in Those Exclusive Private Clubs", <u>Bergen Record</u> , Dec. 12, 1976 ...	13
Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 Harv. Civ. Rts. L. Rev. 351 (1983) ...	7
Lynton, Behind Closed Doors: Discrimination by Private Clubs: A Report Based on City Commission on Human Rights Hearings (1975)	7
Powell, The Social Milieu As a Force in Executive Promotion (1969)	14
Schafraan, Private Clubs, Women Need Not Apply, 23 Foundation Press (1982)	15,17
Summary of Action of the House of Delegates of the American Bar Association for the 1983 Annual Meeting	12

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BRIEF FOR THE NAACP LEGAL DEFENSE AND
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IN SUPPORT OF PETITIONER

=====

Interest of Amicus Curiae

The NAACP Legal Defense and Educational Fund, Inc., has long been concerned with discrimination and deprivation of civil rights of any kind. Discrimination

against women among private organizations and clubs rests on the same ill-founded claims that are offered to defend racial discrimination in the same kinds of institutions. Whatever the basis for a privacy defense in some cases, the NAACP Legal Defense and Educational Fund, Inc., seeks to demonstrate that such claims have no basis when the organization in question is neither genuinely private nor uninvolved in the commercial life of the community. Petitioner and Respondent have consented to the filing of this brief. Written consent of the petitioner accompanies this brief. Written consent of the respondent will be forwarded to the Court under separate cover. Therefore, we file this brief *amicus curiae*.

I

THE UNITED STATES JAYCEES DO NOT FALL WITHIN THE ZONE OF PRIVACY WHICH RENDERS PRIVATE CLUBS AND ORGANIZATIONS IMMUNE FROM GOVERNMENT REGULATION

This case involves an asserted right of private association, which is challenged by the state's unquestioned power to regulate business activity. While there may be a constitutional right to participate in some private clubs, amicus submits that in situations where private, confidential, intimate association is minimal and where business activity is substantial, claims of privacy must yield to the state's power to regulate commercial conduct. This is such a case.

While there is no precise definition of genuinely private clubs, courts have articulated several criteria for identifying them. These include selectivity,^{1/}

^{1/} See Sullivan v. Little Hunting Park, Inc., 396 U.S. 299 at 236 (1969) (plan or

size,^{2/} business involvement,^{3/} and other functions.^{4/} The most important analysis con-

1/ continued

purpose of exclusiveness necessary for private club status).

2/ In Nesmith v. Y.M.C.A., 397 F.2d 96 (4th Cir. 1968), because there were no limits set on the size of membership and over 99% of white applicants were accepted, the Raleigh YMCA was held to be a public establishment.

3/ In Daniel v. Paul, 395 U.S. 298 at 301 (1969), the Court described the assertion of private club status as a sham, stating, "it is simply a business operated for profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs".

4/ See Wright v. Cork Club, 315 F. Supp. 1143 (1970). Minimum standards that should be met by any organization to come within private club exemption include (1) machinery to carefully screen membership; (2) limitation on the use of facilities and services to members and bona fide guests of members in good standing; (3) control of the organization by its members; (4) the organization must be non-profit and operated solely for the benefit and pleasure of the members; (5) publicity, if any, is directed solely and only to members for their information and guidance.

cerns membership policies. The Jaycees offer no selection criteria for membership other than age and sex. The Executive Director for the affiliated organization of Minnesota stated that he had no knowledge of a single rejection of any application for membership. The National Offices and Directors Guide 1977-78 asks: "What is your obligation as Jaycees? Is it to only recruit a chosen few who ... are deemed to be quality members? ... How you sign up a member is not nearly as important as what you do with that member once he has been inducted". Valdes Vavere, the president of the Minneapolis Chapter, testified that the Jaycees should not make value judgments about people [they] are considering, that everyone should be considered (T. 162). There appears to be no limit on the size of the membership. One of the major activities of the Jaycees is the sale of membership in

the organization. It encourages continuous recruitment of members with the expressed goal of increasing membership. The Minnesota Human Rights Commission found that more than eighty percent of national officers' time is dedicated to recruitment, and more than half of the available achievement awards are in part conditioned on achievement in recruitment.

The business characteristics of an association also determine its public or private classification. Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1204 (D. Conn. 1974) ("to have their privacy protected, clubs must function as an extension of members' homes and not their businesses..."). To assess the amount of commercial activity within a club, one commentator has suggested weighing such various objective criteria as business in which members are involved,

employer subsidy or membership, deductibility of expenses, use of the club for business purposes and subject matter of meetings.^{5/}

That the Jaycees is an extension of a person's business is apparent from its purposes, characteristics, and programs. In addition to the large number of businessmen in its membership and the business contacts they provide, the organization was founded for the sole purpose of promoting the business interests of its members. See N.Y. City Jaycees, Inc. v. The U.S. Jaycees, Inc., 512 F.2d 856, 858 (2d Cir. 1975). Toward this end, the Jaycees claims to be a young man's training organization

^{5/} E. Lynton, Behind Closed Doors: Discrimination by Private Clubs: A Report Based on City Commission on Human Rights Hearings (1975) at 56-57. Cited and quoted in Michael M. Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 Harv. Civ. Rts. L. Rev. 351 (1983).

emphasizing the development of management ability. The president of the national organization in letters published in Future (the official publication of the organization) maintains that it is the "greatest young men's leadership training organization..." Future Jan. - Feb. 1979 at 4 (Exhibit 55A-79). Programs and materials provided include a personal dynamics program, a public speaking program, and leadership dynamics materials. The commercial nature of the organization is further evidenced by the fact that it is oriented toward civic and business rather than social activities. Of considerable importance are the ties to corporations through sponsorship of members. Corporations apparently accept the Jaycees claim that it gives members an advantage in business and civic advancement and pay membership fees for their employees.

This corporate recognition of the Jaycees training is seen in promotional practices as well. As one woman testified, she was told to join the Jaycees by the personnel department of her company upon inquiring about promotion possibilities (T. A210-211).

Indeed, the Jaycees is a business itself in a very real sense. It sells leadership training, business contacts, and promotions in exchange for membership fees. It solicits members and refers to them as Jaycees officers' "customers". Officer & Director's Guide 1978-70. The national organization's Recruitment Manual's Preface states: "JAYCEES THE PRODUCT you are selling is outstanding from any angle. Jaycees is the 'best value' you can get" (emphasis in original). The Recruitment Manual states that "[o]nce a young man becomes a member, the responsibility to

deliver the goods you sold him begins."

Moreover, Jaycees also provide a variety of products featured in the Jaycees magazine (Ex. 27), including personal items, travel accessories, casual wear, officer pins, awards and gifts (Ex. 15) which may be purchased by anyone through the mail and by telephone from the national office (Ex. 80, p. 17; T. A80, B57). The Minnesota state office also maintains Jaycees products for sale to local chapters and others (T. A78, B57). The state organization receives a commission from the national organization for its promotion of U.S Jaycees products (T. A79). Indeed as a business alone, Jaycees should be subject to the normal regulation which the state may impose on commercial enterprises. Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).

II

THE STATE HAS A LEGITIMATE AND SUBSTANTIAL INTEREST IN SECURING FOR WOMEN THE SAME OPPORTUNITIES AND ADVANTAGES PRIVATE ORGANIZATIONS OFFER MEN

It requires no citation of authority to assert that where an activity inflicts substantial harm on society or a segment of it, the state may regulate that activity unless it enjoys some countervailing protection. In the first section we have demonstrated that whatever protection genuinely private organizations may have, the Jaycees do not inhabit that zone. Here we argue that where discrimination by a private organization inflicts such harm, the state may prohibit it.

That membership in prestigious clubs affects career opportunities is indisputable.^{6/} Indeed, the American Bar Associa-

^{6/} "Epecially in the years since the end of the Second World War, membership in one or two of the leading men's clubs, which

tion has called for an amendment to the Civil Rights Act of 1964 which would subject to its provisions sex discrimination in clubs where a substantial amount of business is conducted. Summary of Action of the House of Delegates of the American Bar Association for the 1983 Annual Meeting p. 35. This amendment, of course, would perform the function in national legislation which the Minnesota law performs within that state.

The nation's evolving public policy against gender discrimination can be seen in the areas of employment, housing, and credit opportunities as well.^{7/} The Jaycees

6/ continued

lie at the center of commercial power in most large cities in the nation, has become a tacit prerequisite for promotion to the top positions in the executive suites of our large national corporations". E. Baltzell, The Protestant Establishment 362 (1964).

7/ See, Civil Rights Act of 1964, 42

cannot reconcile their membership policies with their proclamation of responsiveness to community needs in light of the fundamental national commitment to end discrimination.

The Survey Research Center of the University of Michigan has found that fifty-eight percent of the executives responding to a survey felt that belonging to the "right" clubs or lodge definitely affected a person's opportunities for promotion.^{8/} In a 1969 study sponsored by the American Jewish Committee, corporate executives were interviewed with regard to the types of professional advantages

7/ continued

U.S.C. § 2000(a) (1976)(employment); Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1976)(housing); Equal Credit Opportunity Act, 15 U.S.C §§ 1691, 1691(a)-1691(f) (1976) (credit).

8/ Berry, New Assaults Coming in Those Exclusive Private Clubs, Bergen Record, Dec. 12, 1976.

provided by social clubs: 61.5% believed that the "club is a place where information directly or indirectly relevant to the firm is obtained"; 50.5% believed that the "club provides contacts which are valuable in obtaining business"; 87.2% felt that the "club affords a prestigious place where guests and customers can be taken for informal lunches and association"; 67.9% believed that "club membership adds to one's status in the firm and/or in the community"; 64.2% agreed that the "club provides an environment for the development of personal friendships which may assist an individual directly or indirectly to gain promotion within his firm"; and 71.6% believed that the "club provides an environment in which to make contacts and friends leading to better positions in other companies".^{9/}

^{9/} R. Powell, The Social Milieu as a Force in Executive Promotion (1969) at 8.

The business world's commitment to these attitudes is seen in employer willingness to pay club dues. For example, the National Club Association estimates 37% of its members' dues are paid directly by business and that percentage does not include reimbursement of dues paid in the first instance by employees.^{10/} The president of New York City's University Club has assumed conservatively that employers are the source of well over 50% of its dues and fees.^{11/}

This exclusion of women not only deprives female employees of an advantage their male counterparts receive, it has served as a grave disadvantage in their careers. Ineligibility for club membership has been cited as a reason for not promot-

^{10/} Schafran, Private Clubs, Women Need Not Apply, 23 Foundation Press, 5 (1982).

^{11/} Id. at 5.

ing women to executive positions. Less blatantly, women are hindered by not being able to meet knowledgeable peers or learn the earliest news of job openings, business opportunities, grants to be awarded, and so forth.

The Supreme Court in McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1959), and Sweatt v. Painter, 339 U.S. 629, 624 (1959), accorded constitutional protection to the interchange of ideas and values among blacks and whites. It stressed the importance of knowing and understanding the people with whom one must inevitably interact in the course of business. The Minnesota statutory scheme attempts to aid business men and women of that state in interacting with the opposite sex in similarly mutually fruitful ways.

More important than the practical, business effects referred to above, is the

social impact - with business consequences - exclusion has on women and men throughout society. A New York public official has observed that banning women from informal centers of power "reinforces the perception that women are not appropriate participants where formal power is exercised."^{12/}

The Jaycees is a highly visible organization in the community. It represents that its members constitute the thriving business population of America. The absence of women from this population not only reinforces notions that business is a man's world and lends substance to harmful prejudices, it inhibits women's ability to function in business and stifles aspirations of future generations.

Surely, the state may address such a situation. Minnesota merely has exercised

^{12/} Schafran, supra at 5.

conventional police power in prohibiting a harmful discrimination. Its authority should be upheld.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

JACK GREENBERG
BETH J. LIEF
JUDITH REED
16th Floor
99 Hudson Street
New York, N.Y. 10013

ATTORNEYS FOR AMICUS

No. 83-724

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CLERK

IN THE
Supreme Court of the United States

IRENE GOMEZ-BETHKE, Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY III, Attorney General
of the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Appellants,

v.

THE UNITED STATES JAYCEES,
A non-profit Missouri corporation, on behalf
of itself and its qualified members,

Appellee

**On Appeal from the United States Court of Appeals
for the Eighth Circuit**

**BRIEF FOR THE NATIONAL LEAGUE OF CITIES,
THE INTERNATIONAL CITY MANAGEMENT
ASSOCIATION,
THE UNITED STATES CONFERENCE OF MAYORS,
AND THE NATIONAL ASSOCIATION OF COUNTIES
AS AMICI CURIAE IN SUPPORT OF APPELLANTS**

LAWRENCE R. VELVEL *

Chief Counsel

ELAINE D. KAPLAN

Attorney

State and Local Legal Center
444 North Capitol Street, NW
Suite 349

Washington, D.C. 20001

(202) 638-1445

Counsel for the Amici Curiae

* Counsel of Record

QUESTION PRESENTED

Whether it is constitutional for a state to bar discrimination against women by a huge organization which exists to provide benefits and advantages of great aid in obtaining advancement in the business world.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
INTEREST OF THE <i>AMICI CURIAE</i>	2
STATEMENT OF THE CASE	2
A. The Jaycees Is a Vast Organization Whose <i>Raison d'Etre</i> Is to Aid Its Members' Business Careers	2
B. The Jaycees Places Heavy Emphasis on Recruit- ing and Recruits Unselectively	3
C. The Jaycees Excludes One Group From the Bene- fits of Full Membership: Women	4
D. The Minnesota Department of Human Rights Found That the 386,000 Member Jaycees Is Not a Private Club and Had Violated a State Anti- Discrimination Law	5
E. The Minnesota Supreme Court Ruled That the Jaycees Constitutes a Public Accommodation Under the Special and Broad Definition Man- dated by the State Legislature	6
F. The United States District Court Upheld Minne- sota's Right to Prevent the Jaycees From Dis- criminating Against Women, But Was Reversed by a Divided Panel of the Court of Appeals.....	7
SUMMARY OF ARGUMENT	9
ARGUMENT	14
I. State and Local Governments Can Prevent Public Accommodations From Discriminating Against Women	14

TABLE OF CONTENTS—Continued

	Page
A. State and Local Governments Historically Possess and Have Exercised the Power to Bar Discrimination in Public Accommodations	14
B. The Minnesota Law at Issue is Sensible and Rational and Comports With the Jurisprudence of This Court	15
II. The Minnesota Statute Does Not Infringe a Constitutionally Protected Right of Association..	18
A. This Court's Decisions Establish That There is No Protected Right to Discriminate in Public Accommodations	18
B. Cases in Which the Court Protected the Right of Association Do Not Aid the Jaycees, Whose Argument Would Devastate Government's Power to Bar Invidious Discrimination	19
C. A Decision Upholding the Minnesota Statute Will Not Prevent Private Groups From Exercising Selectivity in Membership	21
D. Minnesota Has a Compelling Interest in Prohibiting the Jaycees From Discriminating Against Women	22
III. The Minnesota Public Accommodations Statute Is Not Unconstitutionally Vague. Moreover, the Vagueness Doctrine Is Inapplicable Here	24
CONCLUSION	26

TABLE OF AUTHORITIES

CASES	Page
<i>Bell v. Maryland</i> , 378 U.S. 226 (1964)	18
<i>Brown v. Board of Education of Topeka</i> , 349 U.S. 294 (1955)	12, 23
<i>Chandler v. Florida</i> , 449 U.S. 560 (1981)	17
<i>Civil Rights Cases</i> , 109 U.S. 3 (1883)	14
<i>Federal Energy Regulatory Commission v. Missis- sippi</i> , 456 U.S. 742 (1982)	17, 18
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973)	22
<i>Heart of Atlanta Motel v. United States</i> , 379 U.S. 241 (1964)	15, 18
<i>Katzenbach v. McClung</i> , 379 U.S. 294 (1964)	15, 18
<i>Katzenbach v. Morgan</i> , 384 U.S. 641 (1966)	25
<i>NAACP v. Alabama</i> , 377 U.S. 288 (1964)	10, 11, 19, 20
<i>National Organization for Women v. Little League Baseball, Inc.</i> , 127 N.J. Sup. 552, aff'd, 67 N.J. 320 (1974)	24
<i>Nesmith v. Young Men's Christian Association</i> , 397 F.2d 96 (4th Cir. 1968)	24
<i>New State Ice Company v. Liebmann</i> , 285 U.S. 262 (1932)	10, 17
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973)	10, 18
<i>Olzman v. Lake Hills Swim Club, Inc.</i> , 495 F.2d 1333 (2d Cir. 1974)	24
<i>Railway Mail Association v. Corsi</i> , 326 U.S. 88 (1945)	18
<i>Reed v. Reed</i> , 404 U.S. 71 (1971)	22
<i>Reeves, Inc. v. Stake</i> , 447 U.S. 429 (1980)	17
<i>Roschen v. Ward</i> , 279 U.S. 337 (1929)	25
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	18
<i>Semler v. Dental Examiners</i> , 294 U.S. 608 (1935) ..	25
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	10, 11, 19, 20
<i>Sullivan v. Little Hunting Park, Inc.</i> , 396 U.S. 229 (1969)	19, 25
<i>Tillman v. Wheaton-Haven Recreational Associa- tion, Inc.</i> , 410 U.S. 431 (1973)	19, 25
<i>U.S. Power Squadrons, Inc. v. State Human Rights Appeal Board</i> , 59 N.Y. 2d 401 (1983)	24
<i>United States v. Cruikshank</i> , 92 U.S. 542 (1876)	14

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Slidell Youth Football Association</i> , 387 F.Supp. 474 (E.D. La. 1974).....	24
<i>United States v. Trustees of F.O.E.</i> , 472 F.Supp. 1174 (E.D. Wisc. 1979)	24
<i>Wright v. Cork Club</i> , 315 F.Supp. 1143 (S.D. Tex. 1970)	24
<i>Wright v. Salisbury Club, Ltd.</i> , 632 F.2d 309 (4th Cir. 1980)	24
<i>Zobel v. Williams</i> , 457 U.S. 55 (1982)	17

STATUTES

Civil Rights Act of 1875, Ch. 114, 48 Stat. 335 (1875)	14
42 U.S.C. (& Supp. V) § 1983	6
42 U.S.C. (& Supp. V) § 2000a	15
Minn. Stat. § 363.03, subd. 3 (1982)	5
Minn. Stat. § 363.03, subd. 18 (1982)	7

OTHER AUTHORITIES

Project, <i>Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws</i> , 7 N.Y.U.L. & Soc. Change 215 (1978)	14, 15
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IN THE
Supreme Court of the United States

No. 83-724

IRENE GOMEZ-BETHKE, Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY III, Attorney General
of the State of Minnesota; and
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of the State of Minnesota,
Appellants,

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THE UNITED STATES JAYCEES,
A non-profit Missouri corporation, on behalf
of itself and its qualified members,
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On Appeal from the United States Court of Appeals
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**BRIEF FOR THE NATIONAL LEAGUE OF CITIES,
THE INTERNATIONAL CITY MANAGEMENT
ASSOCIATION,
THE UNITED STATES CONFERENCE OF MAYORS,
AND THE NATIONAL ASSOCIATION OF COUNTIES
AS AMICI CURIAE IN SUPPORT OF APPELLANTS**

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations that represent governments located throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of such governments. This case presents an issue of great importance concerning the authority of these governments to enforce statutes that proscribe discrimination.

State and local governments have proscribed various forms of discriminatory conduct for over a century, long before the federal government's power to do so was firmly established by this Court. Today at least thirty-eight states and numerous localities have laws that proscribe various types of discrimination in places of public accommodation. These laws include proscriptions against the discriminatory denial by public entities of equal access to important tangible and intangible goods and important services. In many states and localities these goods and services include the benefits, privileges and advantages provided by large public organizations whose *raison d'être* is to aid their members' advancement in business. Because a law providing for equal access to such goods and services has been struck down in this case, *amici* are submitting this brief to assist the Court in considering the issues raised by this litigation, issues which have broad implications for the power of state and local governments to prevent discrimination.¹

STATEMENT OF THE CASE²

A. The Jaycees Is a Vast Organization Whose *Raison D'Être* Is to Aid Its Members' Business Careers

The United States Jaycees is a vast national organization. It has approximately 386,000 members in 8800 local

¹ Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

² References to the Appendix are noted as A—.

chapters located throughout the 50 states and the District of Columbia. A-57; A-96. Its individual members are between 18 and 35 years of age. *Id.* at 58, 70, 96-97.

The *raison d'être* of this huge organization is to aid its members in achieving success in business. To this end the Jaycees provides them with business contacts and leadership training, including training in organizational skills, public speaking, supervising large numbers of people and handling large amounts of money. A-57; A-79 to A-80; A-101 to A-103; A-120 to A-121.

In accordance with its *raison d'être*, the Jaycees claims that membership will give an individual an advantage in the business world. A-57; A-79 to A-80. Testimony in this case establishes that the claim is true: the testimony shows that membership has enabled individuals to learn speaking skills, to learn how to plan and delegate, to learn how to manage people, and to obtain promotions and successful job interviews. *Id.* at 100-102; 120-121.

Because membership in the Jaycees aids their employees' business abilities, many corporations pay the employees' membership fees. This accords with the Jaycees' desire and request. A-79; A-105. Corporations also permit employees to do Jaycee work on company time and give employees logistical support for such work.³

B. The Jaycees Places Heavy Emphasis on Recruiting, and Recruits Unselectively

The Jaycees has grown to its present huge size by selling memberships indiscriminately. The national Jaycee organization discourages selectivity in favor of recruitment in quantity, and there is constant stress throughout the organization on selling ever more memberships. A-57 to A-58; A-83 to A-85; A-104. Thus, the national organization provides materials, contests, awards and per-

³ See *Brief of Northwestern Bell Telephone Company as Amicus Curiae in Support of Appellants' Jurisdictional Statement*, at 4.

sonnel to encourage and assist the local chapters in selling memberships. *Id.* at 83-84; 104. More than 50 percent of all awards bestowed by the national organization involve recruiting. *Id.* at 84. The state president in Minnesota spends 80 percent of his time on matters related to recruitment and 90 percent of the conversations between the president of the Minneapolis chapter and the state president or other high officers concern recruitment. *Id.* at 58; 104. The emphasis on recruitment is so all-pervasive that officers of the Minneapolis and St. Paul chapters who testified in this case could not recall a single instance in which an applicant was ever turned down. *Id.* at 58; 119.

In recruiting members, the Jaycees uses commercial terms. Thus, instructional materials exhort recruiters to "sell" the "product", and the "product" is extolled as the "best value" obtainable. Potential members are called "customers" and are assured that membership will give them "an edge in life." A-78 to A-80.

C. The Jaycees Exclude One Group From the Benefits of Full Membership: Women

There is one group between 18 and 35 in American society which is denied the benefits of full membership in the Jaycees: women. Under the by-laws of the national organization, women cannot acquire individual memberships. A-58; A-70; A-98. They cannot become officers at any level of the Jaycees, cannot lead any projects, do not receive any of the leadership training or business contacts obtained by officers and leaders, cannot receive any awards, and are ineligible to vote. *Ibid.*

The only organizational opportunity permitted to women by the Jaycees is that they can become "associate members." In that capacity they can work as subordinates on Jaycees projects, but cannot acquire the benefits and privileges described above. A-58; A-70; A-98 to A-99. Thus they are allowed to be private foot soldiers

in the Jaycees army, but any higher rank is closed to them.

D. The Minnesota Department of Human Rights Found That the 386,000 Member Jaycees Is Not a Private Club and Had Violated a State Anti-Discrimination Statute

In 1974 the Minneapolis and St. Paul chapters of the Jaycees decided it was appropriate to provide women with the same leadership training, business contacts and opportunities for career advancement that are provided to men. These chapters therefore amended their by-laws to permit women to become individual members. A-59; A-70 to A-71; A-98 to A-99. The national organization thereupon imposed sanctions against these chapters from 1975 through June 1978. *Id.* at 59; 71; 99-100. In December, 1978, it threatened to revoke their charters. *Id.* at 59; 71; 100.

In mid-December, 1978, members of the Minneapolis and St. Paul chapters, including the chapter presidents, filed charges of sex discrimination against the national Jaycees. A-53; A-71; A-94. The charges, filed with the Minnesota Department of Human Rights, were brought under the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 3 (1982). This law bars discrimination in public accommodations, and broadly defines public accommodations to include conduct by which goods, services and advantages are offered.

At a hearing before the Department of Human Rights, the 386,000 member Jaycees claimed it was the equivalent of a private club. It said it therefore need not admit women as members. A-118.

The hearing examiner rejected the Jaycees' claim. He ruled the organization had none of the attributes of a private club such as selective admissions practices, control of membership, formal admissions procedures, or substantial dues. He further found the Jaycees has characteristics

of a business organization, and is a public accommodation within the meaning of the statute. A-119 to A-121. Based on his findings, the examiner ruled the Jaycees had violated the Minnesota law, and enjoined the Jaycees from discriminating against any member or applicant within the state on the basis of sex. *Id.* at 108-109.

E. The Minnesota Supreme Court Ruled That the Jaycees Constitutes a Public Accommodation Under the Special and Broad Definition Mandated by the State Legislature

The Jaycees thereafter filed suit in the United States District Court for the District of Minnesota under 42 U.S.C. (& Supp. V) § 1983. The organization sought a ruling that the public accommodations provision of the Minnesota Human Rights Act violated an asserted right of association, and requested that the Act's enforcement be enjoined. The district court certified to the Minnesota Supreme Court the question whether the Jaycees is a public accommodation within the meaning of the Minnesota law.

The Minnesota Supreme Court examined the history of the public accommodations law in a thorough and detailed opinion. It held that under this law, which originated in 1885, the Jaycees constitutes a "place of public accommodation" and is therefore prohibited from selling memberships, and offering services, on a discriminatory basis. A-69 to A-91.

The court pointed out that the Minnesota legislature had used a "special and unusually broad definition of the term 'place of public accommodation'," and had expressly mandated a broad construction of the term's coverage. A-72 to A-73. In examining the statute's historical expansion by the state legislature, the court noted that the public accommodations provision originally had concentrated upon the types of *sites* at which discrimination would be prohibited. But now, ruled the court, the statute

focuses upon the types of *conduct* in which discrimination is prohibited. *Id.* at 77.⁴

The court then ruled that, measured against the statutory standard established by the legislature, the Jaycees constitutes a public "business" and a public "business facility" within the meaning of the statute, and falls within the statutory definition of public accommodations. In this regard the court pointed out that the Jaycees offers "goods", "privileges" and "advantages," in the form of leadership training, business contacts, and enhanced opportunities for promotion. Also, it considers its members to be customers for a valuable product. And it lacks any element of selectivity that would denominate it a private organization. Rather than being selective, it indulges a continuous passion for growth. A-77 to A-91.

F. The United States District Court Upheld Minnesota's Right to Prevent the Jaycees From Discriminating Against Women, but Was Reversed by a Divided Panel of the Court of Appeals

After receiving the state supreme court's decision, the district court held the Minnesota public accommodations law does not deprive the Jaycees of a constitutionally guaranteed right of association and is not vague or overbroad. Accordingly, the court ruled that the Jaycees' discriminatory "practice of excluding women from equal benefits does not enjoy protection under the circumstances." A-61. In any event, held the court, Minnesota has a compelling and overriding interest in preventing discrimination in public accommodations. *Id.* at 61-63.

⁴ The statute focuses upon conduct (i.e., upon activities) by providing that a "[p]lace of accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." Minn. Stat. § 363.03, subd. 18 (1982).

A divided panel of the Eighth Circuit then reversed the decision of the district court. The majority purported to accept the Minnesota Supreme Court's holding that the Jaycees constitutes a public accommodation rather than a private social club under the Minnesota Human Rights Act, but Chief Judge Lay said in dissent that the majority's decision represents an implicit disagreement with the state court over the proper interpretation of the state's own statute. A-42 to A-43.

The majority said a constitutionally guaranteed right of association was violated by precluding the Jaycees from discriminating against women. The majority opinion was based on the fact that the Jaycees sometimes takes a position on political issues. The Jaycees does so in the course of providing leadership training to the members who participate in furthering its position. Because the Jaycees occasionally takes stands on political issues—as do businesses, labor unions and political parties—the majority felt the Jaycees has a right of association which enables it to discriminate against women. A-20 to A-23.

The majority was aware that a person's stand on a political issue has never been a criterion for initial or continuing Jaycee membership, and that there was no showing that an individual's stand on an issue is determined by sex. A-24 to A-25. Nevertheless, it said the Jaycees can exclude women because someday a political or internal issue might arise which *could* be determined by sex. *Ibid.*

The court further ruled that Minnesota does not have a compelling interest which would allow it to overcome the Jaycees' right to discriminate against women. A-27 to A-30. And though the state was not attempting to invoke a criminal penalty, the majority also held the statute unconstitutionally vague. In this regard it said the decision of the Minnesota Supreme Court does not enable one to distinguish the Jaycees from other organizations that assertedly would be immune from the statute, such as the Kiwanis. *Id.* at 37-40.

In dissent, Chief Judge Lay pointed out that the advantages offered by the Jaycees are as necessary and appropriate for young women as for young men, and that the majority's speculations are a highly insufficient basis for disabling the state "from enforcing its overpowering interest within this sphere of public accommodations." A-44; A-46. He also denied the law is unconstitutionally vague, saying that long "usage as well as common understanding provides well-defined contours to the public-private distinction the Minnesota court utilized." A-49.

After the decision, the state petitioned the Eighth Circuit for rehearing *en banc*. Half the judges of the court voted for rehearing, but under the rules this was an insufficient number. A-181 to A-183.

SUMMARY OF ARGUMENT

A. Discrimination is conduct which state and local governments historically possess the power to prevent. In barring discrimination, state and local jurisdictions carry out a vital governmental interest in assuring that citizens receive equal access to important goods, services, rights and benefits. Laws precluding discrimination in public accommodations have thus been enacted by many state and local governments.

Minnesota's public accommodations law, like the laws of numerous other states, incorporates a broad functional definition of public accommodations. Such definition encompasses conduct by which intangible goods and services are provided. It is entirely sensible and rational for a state to use such a definition. For the American economic system increasingly consists of activities which produce intangible goods and services, and access to these goods and services is at least as important as access to historical public accommodations such as restaurants and theatres.

The Minnesota legislature also acted rationally in providing that women, no less than men, shall have access to

vital goods and services, including those which greatly aid an individual's ability to advance in his or her business career. Women have the same interest as men in obtaining such items, and it is wholly reasonable for the state legislature to ensure the items will not be denied them.

Finally, in defining public accommodations in a functional manner, and in barring discrimination against women, the Minnesota legislature acted in a way that comports with the jurisprudence of this Court. Ever since Justice Brandeis' seminal dissent in *New State Ice Company v. Liebmann*, 285 U.S. 262, 311 (1932), this Court and individual Justices have recognized that state legislatures must be permitted to develop new solutions to meet the changing needs of the times. Minnesota's law is in this tradition, since the state has recognized the increasing role of intangible goods and services in the economy and the increasing role of women in economic affairs. The state's innovative efforts should not be stifled by the judiciary.

B. The Minnesota law does not infringe a constitutionally protected right of association. This Court has stated that, though "invidious private discrimination may be characterized as a form of exercising freedom of association . . . it has never been accorded affirmative constitutional protection". *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). The Court has also ruled that there is no protected right to discriminate in public accommodations. And it has held anti-discrimination laws applicable to organizations which, like the Jaycees, claimed to be private clubs.

Contrary to the Jaycees' claim, this Court's decisions in *NAACP v. Alabama*, 377 U.S. 288 (1964) and *Shelton v. Tucker*, 364 U.S. 479 (1960), do not support the organization's position. In those cases state laws were invalidated because they required disclosures which would have subjected members of unpopular groups to retaliation, thereby making it impossible for those individuals to as-

sociate with the groups and advocate the groups' positions. This case, by contrast, involves an enormously popular group with a powerful membership. The prospect of retaliation against the Jaycees' members if the organization complies with the Minnesota law is nonexistent, and the threat to the members' right to associate with the organization or advocate its positions is correspondingly nonexistent.

Furthermore, unlike this case, *NAACP v. Alabama* and *Shelton v. Tucker* did not involve invidious discrimination by those who operate a public accommodation. For this reason, too, those cases provide no succor for the Jaycees.

The possibility that the Jaycees' stand on political issues may be affected by the sexual composition of its membership cannot give the organization a right to discriminate on a sexual basis, lest government's ability to ban various forms of invidious discrimination be vitiated. Businesses, labor unions and other public entities often take stands on political and internal organizational issues. Under the Jaycees' argument, these groups would be able to engage in sexual discrimination because of the possibility that their stands could be affected by the groups' sexual composition. Moreover, the Jaycees' argument cannot be confined to sexual discrimination, but extends to and would legalize racial and religious discrimination. For the racial and religious composition of a group is at least as likely to affect its stands as its sexual composition.

Finally, contrary to the Jaycees' argument, other groups (such as those based on religious belief or ethnic origin) will not be barred from exercising selectivity in membership if the Jaycees cannot discriminate against women. Other groups will rarely constitute public accommodations because, unlike the Jaycees, they will not exist for the express purpose of providing services of great benefit in obtaining advancement in the business world, will not view themselves as selling a product to customers, will not have a huge and unlimited membership, and will not

recruit unselectively. Also, unlike the Jaycees, many of these groups will have members united by some unique characteristic, unshared by others. Nor will they admit all persons except one class, which is invidiously excluded.

C. Even if the Jaycees has an associational right to discriminate, Minnesota has a compelling interest which enables it to overcome that right and bar the discrimination. Ensuring equal access to important rights, goods, benefits and services is one of the crucial functions of government in today's world, and this case involves access to an important category of such benefits and services—it involves access to the tools of advancement in the business world. Obtaining access to such tools is at least as important to an individual as gaining entree to traditional public accommodations such as restaurants and inns, and the state, one of whose major functions is to guarantee equality, has a high interest in assuring that women are not disadvantaged in this regard.

Finally, the state's high interest cannot be elided by arguing that Minnesota lacks a compelling interest in barring discrimination unless it first shows that women cannot obtain the same benefits from membership in other organizations as from membership in the Jaycees. In discrimination cases there is no requirement that a victim must lack access to other similar facilities, in addition to the one he or she is being deprived of, before government can remedy the discrimination or possesses a compelling interest in doing so. Such a requirement, imposed by the court below, is simply the discredited concept of separate-but-equal facilities rejected by this Court thirty years ago in *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955). Its revival now would allow discrimination to flourish on the claim that the victim has alternatives and government therefore lacks a compelling interest in banning discrimination.

D. The decision of the Minnesota court did not render the statute unconstitutionally vague. Rather, the state

court applied criteria developed and commonly used by federal and state courts in determining whether a group is a public organization covered by a public accommodations law. Thus it examined factors such as the Jaycees' size, membership policy, interest in growth, and manner of recruitment, and also considered the types of benefits and advantages offered by the Jaycees. This Court itself has used some of these same criteria in determining whether a group is public or private. Use of such criteria does not render a statute vague. Instead it provides appropriate guidelines for measuring whether a group constitutes a public accommodation.

Moreover, the vagueness doctrine is inapplicable to this case. The doctrine protects constitutional rights against the danger of retroactive punishments based on unclear statutes directed at basic liberties. The doctrine has no applicability where, as here, the statute is a reform law which extends equality and the action sought is prospective. Reform statutes are not required to cover every aspect of the problem they address, but can confine themselves to the most acute portion of the problem. It is therefore irrelevant that the statute may conceivably cover the Jaycees but not the Kiwanis. Moreover, neither the Jaycees, Kiwanis, nor any other organization has any cause to fear claimed vagueness when the remedy is only prospective. For a prospective remedy does not force an organization to act at its peril. Rather, the organization need take action only after being adjudicated in violation of the law, and even then it need only conform itself to the law. Thus the retroactive danger against which the vagueness doctrine guards is wholly absent in this case.

ARGUMENT

I. STATE AND LOCAL GOVERNMENTS CAN PREVENT PUBLIC ACCOMMODATIONS FROM DISCRIMINATING AGAINST WOMEN

A. State and Local Governments Historically Possess and Have Exercised the Power to Bar Discrimination in Public Accommodations

Discrimination is conduct. It is, moreover, conduct which state and local governments historically have the power to prevent. Thus, the first state law barring discrimination in public accommodations preceded by a decade the first federal public accommodations law, the Civil Rights Act of 1875, Ch. 114, 48 Stat. 335 (1875). Today at least thirty-eight states and the District of Columbia have statutory provisions that prohibit various forms of invidious discrimination in public accommodations.⁶

The power of states to preclude discrimination was specifically recognized by this Court as long ago as the 1870's. Thus, in *United States v. Cruikshank*, 92 U.S. 542, 555 (1876), the Court declared:

The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there.

Seven years later, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court reaffirmed that the states have the authority to prevent private discrimination in public accommodations. Notably, in that very same case, the Court invalidated the federal public accommodations law of 1875, pointing out that prevention of discrimination

⁶ See Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. L. & Soc. Change 215, 292-293 (1978).

is properly left to state legislatures. It was not until the 1960's that the Court upheld the right of Congress to enact a federal public accommodations law. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzbach v. McClung*, 379 U.S. 294 (1964).

In barring discrimination, state and local jurisdictions carry out an important governmental interest in assuring that citizens receive equal access to important rights and benefits. Equal access is so crucial, indeed, that at times the Constitution *compels* government to assure it.

In carrying forward this governmental interest, state and local public accommodations laws vary in terms of the actors who are covered. Some states prohibit discrimination at specifically listed, fixed sites, such as restaurants, hotels, stores and theatres, while other states define public accommodations in a broad functional way that prevents discrimination by those engaged in various forms of conduct. State and local laws also differ in terms of the types of discrimination which are precluded. The prohibited types include discrimination based on race, color, national origin, ancestry, religion, creed, sex, marital status, physical handicap, mental handicap, and age. In this regard, state laws often are broader than the federal public accommodations law, which covers only discrimination on the basis of race, color, religion and national origin. 42 U.S.C. (& Supp. V) § 2000a. See Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U.L. & Soc. Change, 215, 290-293 (1978).

B. The Minnesota Law at Issue Is Sensible and Rational, and Comports With the Jurisprudence of This Court

Minnesota is one of the states whose anti-discrimination law incorporates a functional definition of public accommodations—a definition which includes conduct by which goods and services are provided. Minnesota is also

one of the states which bars discrimination based on sex. The state's law is sound, rational and entirely within the power of a legislature to enact.

As is well known, the American economic system increasingly consists of activities by which intangible goods and services are provided. In fact, it is widely thought the economy is becoming service oriented as financial services, insurance services, medical services, data processing services, and educational services expand to occupy a greater share of the gross national product. Because access to intangible goods and services is at least as crucial as access to historical public accommodations such as restaurants and theaters, it is entirely sensible for a state legislature to define "public accommodations" in a functional manner, in order to encompass an expanded range of goods and services.*

It is equally rational for a state legislature to determine that women, no less than men, shall have access to important goods and services. That, of course, is precisely what the Minnesota statute provides in this case, since it mandates that women too shall receive access to goods, services, advantages and privileges which are of great aid to an individual's business career.

That the Jaycees provides such services and advantages is both self proclaimed by the organization and beyond dispute. Like other business and professional organizations, the Jaycees provides members with access to a network of business contacts and influential persons. The Jaycees also teaches leadership and organizational skills, gives experience in managing large sums of money and large numbers of volunteers, and enables members to learn public speaking. And the testimony in this case specifically establishes that playing a leadership role in the Jaycees is extremely valuable to a person's business career.

*In addition to the services previously mentioned, intangible goods and services include telephone and utility services.

In defining public accommodations in a functional manner that covers important goods, services, privileges and advantages, and in barring discrimination against women in the provision of these items, the Minnesota legislature has acted in a manner that comports with the jurisprudence of this Court. Ever since the seminal dissent of Justice Brandeis in *New State Ice Company v. Liebmann*, 285 U.S. 262 (1932), the Court and individual Justices have recognized that state legislatures must be given leeway to adopt solutions that meet the changing needs of the times. See *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (O'Connor, J., concurring); *Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980). As Justice Brandeis himself said:

There must be power in the states and the nation to remould through experimentation, our economic practices and institutions to meet changing social and economic needs.

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidences of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. 285 U.S. at 331.

More recently, Justice O'Connor pointed out that the Brandeisian concept of allowing states to develop "new social, economic and political ideas" "is no judicial myth." *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in part, and dissenting in part). Justice O'Connor pointed out that Wyoming pioneered in permitting women to vote, Wisconsin pioneered in unemployment insurance, and Massachusetts pioneered in minimum wage laws for women and minors. *Id.* at 788-789. She added that states have enacted innovative and far-reaching statutes in the field of environmental protection, and one could also add

that states took the lead in insurance regulation. *Id.* at 789.

Minnesota's law is in this tradition. That state has recognized the increasing role of intangible goods and services in the economy, and the increasing role of women in economic affairs. It has taken steps to safeguard the access of all persons to goods and services, regardless of sex. The state's efforts should not be stifled by the judiciary. This is only the more true because, as will be discussed *infra*, this Court has repeatedly upheld laws which bar discrimination in access to vital public accommodations.

II. THE MINNESOTA STATUTE DOES NOT INFRINGE A CONSTITUTIONALLY PROTECTED RIGHT OF ASSOCIATION

A. This Court's Decisions Establish That There Is No Protected Right to Discriminate in Public Accommodations

Though Minnesota has the power to bar discrimination in public accommodations, the Jaycees claims the statute infringes a constitutionally protected right of association. However, this Court has stated that, although "invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protection." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). See also, *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Railway Mail Association v. Corsi*, 326 U.S. 88, 93-94 (1945). The Court has also held, contrary to the Jaycees' position, that there is no protected right to discriminate in public accommodations. *Heart of Atlanta Motel v. United States*, *supra*, 379 U.S. at 240-241; see *Katzbach v. McClung*, *supra*, 379 U.S. at 305; and *Bell v. Maryland*, 378 U.S. 226, 312 (1964) (Goldberg, J., concurring).

Finally, the Court has refused to allow discrimination by organizations which, like the Jaycees, claimed to be

private clubs but really were public groups. See *Tillman v. Wheaton-Haven Recreational Association, Inc.*, 410 U.S. 431 (1973); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969). As is true of the Jaycees, these organizations were open to all persons, with the exception that discrimination was practiced against a class of individuals which was excluded.

Thus the Court's cases establish that discrimination is unprotected conduct which is not saved by claims of a right of association.

B. Cases in Which the Court Protected the Right of Association do not Aid the Jaycees, Whose Argument Would Devastate Government's Power to Bar Invidious Discrimination

The Jaycees, however, claims immunity from regulation under such cases as *NAACP v. Alabama*, 377 U.S. 288 (1964); and *Shelton v. Tucker*, 364 U.S. 479 (1960). These decisions, it says, establish that a right of association for the advancement of beliefs takes precedence over the governmental regulation at issue here.

The *NAACP* and *Shelton* cases do not support the Jaycees' position, however. In those cases, members of unpopular groups were threatened with devastating retaliation if their names or affiliations were revealed pursuant to state law. Such retaliation would have made it impossible for the members to continue to associate with the groups or advocate the groups' beliefs. The Court therefore held the state law invalid.

The present case presents a far different situation. It does not deal with members of a politically unpopular group. Rather, it concerns an enormously *popular* group, which has a huge membership predominantly comprised of employees and leaders of the powerful American business community. The prospect that the regulation at issue will lead to retaliation against the Jaycees or its members is nil. The threat to a right to associate with the

group or advocate its positions is correspondingly nil. Thus, the state law is not invalid.⁷

Moreover, unlike the present case, *NAACP v. Alabama* and *Shelton v. Tucker* did not concern invidious discrimination by those who operate a public accommodation. For this reason, too, those cases give no succor to those who would discriminate under the guise of freedom of association.

The Jaycees' argument must also be rejected because it would devastate the ability of state, local and federal governments to ban discrimination of all types.

Businesses, labor unions and other public entities often take a stand on political issues or on internal organizational issues. Under the Jaycees' argument, the possibility that such a stand may be affected by the sexual composition of the organization's membership gives the organization a right to discriminate on a sexual basis, and precludes government from barring such discrimination. Moreover, the Jaycees' argument cannot be confined to sexual discrimination. The racial or religious composition of an organization is at least as likely to affect its stand on issues as its sexual composition. Thus, under the Jaycees' contention, the organization would have an associational right to discriminate on the basis of race or religion as well as on the basis of sex. The argument would therefore give businesses, unions and other public groups a protected right to discriminate on a variety of invidious bases, and would remove the power of government to bar such discrimination. Decades of recent history would thereby be nullified.

⁷ The group's positions may change, of course, if it cannot discriminate. But, as developed *infra*, such potential for change cannot vitiate the statute, lest government be precluded from barring invidious discrimination by public groups.

C. A Decision Upholding the Minnesota Statute Will Not Prevent Private Groups From Exercising Selectivity in Membership

Finally, the Jaycees contends that, if it cannot discriminate against women, then other groups will be banned from exercising selectivity in membership. In this vein it says that "[p]rivate groups based on religious belief (such as B'nai B'rith or Knights of Columbus) or ethnic or national origin (such as Polish Women's Alliance, Columbus Squires or Sons of Norway) will be threatened." It also has claimed that such organizations as the Junior League and the Sweet Adelines will be threatened.

The Jaycees' argument is devoid of merit. Groups which do not constitute public accommodations will retain the ability to be selective in membership. For a host of reasons, there will be thousands of these groups. Indeed, it is likely to be only the rare group which will constitute a public accommodation and be forbidden to discriminate.

Some of the reasons why most groups will not constitute public accommodations are as follows: Unlike the Jaycees, most groups will not exist for the express purpose of providing services of great benefit in obtaining advancement in the business world. Most will not attempt to confine such vital benefits to half the population, while denying them to the other half even though it has the same interest in obtaining advancement.⁸ Most will not view themselves as selling a product to customers. Most will not have hundreds of thousands of members. Most will not recruit on a totally unselective basis. Many will have limitations on overall membership. Many will have high dues. Many will have members who are united by a unique characteristic unshared by others: this is ex-

⁸ As pointed out in dissent below by Judge Lay (A-44), women have the same interests in business advancement as men. The Jaycees' desire to confine business benefits to males subjugates women's interests to men's. The situation is no different than if the Jaycees said whites alone could obtain the benefits of membership, even though blacks have the same interests as whites.

emplified by the Jaycees' own examples of the B'nai B'rith, the Knights of Columbus, and the Sons of Norway, whose members share a religious or ancestral characteristic. Finally, groups which do share a unique characteristic will not admit all persons except one class which is individually excluded, as the Jaycees does, but will allow membership only to those who share the characteristic.

D. Minnesota has a Compelling Interest in Prohibiting the Jaycees From Discriminating Against Women

Even if the Jaycees possesses an associational right to discriminate, Minnesota has a compelling interest which enables it to overcome that right and bar the discrimination.

Assuring that all citizens have equal and nondiscriminatory access to important rights, benefits, goods and services is one of the highly important powers and functions of government in today's world. This function is so crucial that federal, state and local governments have enacted scores of laws barring discrimination on a variety of invidious bases and by a broad spectrum of actors. It is so crucial that this Court has regularly held that governments are *compelled* to provide equal and nondiscriminatory access to rights and benefits which they supply. Thus government has been constitutionally compelled to provide women with benefits equal to men's. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

An important category of rights, benefits, services and advantages is at issue in this case. For women have as much interest as men in gaining advancement in the business world, and the Jaycees is a public organization which provides important tools for such advancement. Obtaining access to such tools is at least as important as gaining access to such traditional public accommodations as restaurants and inns; and the state, one of whose powers and functions is to assure equality, has a high

interest in assuring that women are not disadvantaged in access to the tools.*

The court below sought to circumvent the state's high interest by arguing that Minnesota had not shown it was impossible for women to obtain the same advantages from membership in other organizations as from memberships in the Jaycees. Absent such showing, it said, the state's interest could not be considered compelling.

The argument of the court below is drastically in error. In anti-discrimination cases there is no requirement that, for the situation to be remedied by government or court, the victim must lack access to other facilities in addition to the one he or she is being deprived of. There is no rule under which government lacks a compelling interest in rectifying invidious discrimination by one institution if the victim is not also denied access by some other institution.

Nor does this Court hold it is permissible for a public accommodation to invidiously discriminate if another public accommodation provides a similar facility or service. Such a holding—which is the holding of the court below—is simply the discredited concept of separate-but-equal rejected by this Court thirty years ago in *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1953). Were the holding of the court below to prevail, discrimination of all types would flourish on the claim that the victim has alternatives and government thus lacks a compelling interest in banning discrimination. The jurisprudence of three decades, and the extensive efforts of governments at all levels to remedy discrimination, would be undermined. The argument of the court below that Minnesota lacks a compelling interest must therefore be rejected.

* We doubt that anyone would argue the state does not have a compelling interest in assuring that women have equal access to schooling. Yet one of the recognized benefits of schools is that they give a person the tools to participate and succeed in the commercial world. The Jaycees does the same.

III. THE MINNESOTA PUBLIC ACCOMMODATIONS STATUTE IS NOT UNCONSTITUTIONALLY VAGUE. MOREOVER, THE VAGUENESS DOCTRINE IS INAPPLICABLE HERE

The court below also held that the state statute is unconstitutionally vague because the decision of the Minnesota Supreme Court provides no standard for distinguishing public accommodations from private clubs. In this regard the majority expressed concern that the state supreme court had provided no basis for distinguishing the Jaycees from the Kiwanis, which the state court indicated would be a private group.

The view of the court below is in error. Rather than rendering the statute unconstitutionally vague, the Minnesota Supreme Court applied criteria developed and commonly used by federal and state courts in determining whether a group is a public organization covered by public accommodations laws.¹⁰ The state court thus considered the Jaycees' size, which is huge, its membership policy, which is unselective and uncontrolled by size, its interest in growth, which is continuous, its manner of recruitment, which applies commercial concepts, and the benefits it offers, which are expressly designed to aid in business. The use of criteria such as these, which are normally employed by courts, does not render a statute vague. Rather, it provides appropriate guidelines for measuring whether a group is a public or private organization.

¹⁰ See e.g., *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309 (4th Cir. 1980); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Nasmith v. Young Men's Christian Association*, 397 F.2d 96 (4th Cir. 1968); *United States v. Trustees of F.O.E.*, 472 F.Supp. 1174 (E.D. Wisc. 1979); *United States v. Slidell Youth Football Association*, 387 F.Supp. 474 (E.D. La. 1974); *Wright v. Cork Club*, 315 F.Supp. 1143 (S.D. Texas 1970); *U.S. Power Squadrons, Inc. v. State Human Rights Appeal Board*, 59 N.Y. 2d 401 (1983); *National Organization for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 532, *aff'd*, 67 N.J. 220 (1974).

This Court itself has used some of the very same criteria in determining whether a membership organization is public or private. In *Sullivan v. Little Hunting Park*, for example, the Court determined that an organization was not truly private because it was not selective in membership. The Court said the group was "open to every white person within the geographic area, there being no selective element other than race." 396 U.S. at 236. See also, *Tillman v. Wheaton-Haven Recreational Assoc., Inc.*, *supra*, 410 U.S. at 438.

Moreover, contrary to the opinion of the court below, the vagueness doctrine is not even applicable to this case. That doctrine is properly employed to protect constitutional rights against the danger posed by retroactive punishments based on unclear statutes. It is thus used, for example, to bar criminal penalties, and damage awards, based on ambiguous laws directed against freedom of speech. It has no proper application where a statute is a reform law, and the action sought is only prospective. In such circumstances, which exist here, the doctrine is irrelevant, and asserted concerns that the statute covers the Jaycees but not the Kiwanis are totally misplaced.

Unlike the situation where a statute is directed against constitutional freedoms, a reform law such as Minnesota's does not threaten liberty, but extends the scope of equality. The Court has therefore ruled that such a statute "need not strike at all evils at the same time," can address "itself to the phase of the problem which seems most acute," and "is not invalid under the Constitution because it might have gone further than it did" *Katzbach v. Morgan*, 384 U.S. 641, 657 (1966), quoting *Roschen v. Ward*, 279 U.S. 337, 339 (1929) and *Semler v. Dental Examiners*, 294 U.S. 608, 610 (1935). Thus, that the statute may cover the Jaycees but not the Kiwanis is no ground for invalidating it, a point which cannot be elided by asserting the statute is vague because it allegedly encompasses one group but not the other.

Moreover, neither the Jaycees, Kiwanis, nor any other organization has anything to fear from claimed vagueness when the remedy is prospective, as here. A prospective remedy does not force an organization to act at its peril, as does a retroactive penalty. When the remedy is prospective the organization need do nothing until it is adjudicated to be in violation of the law, and then it need only conform itself to the law. The retroactive danger against which the vagueness doctrine guards is wholly absent.¹¹

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below, which held the state public accommodations law unconstitutional.

Respectfully submitted,

LAWRENCE R. VELVEL

Chief Counsel

ELAINE D. KAPLAN

Attorney

State and Local Legal Center

444 North Capitol Street, NW

Suite 349

Washington, D.C. 20001

(202) 688-1445

Counsel for the Amici Curiae

Dated: February 1984

¹¹ If Minnesota were to bring criminal charges against the Kiwanis in some future case under the statute, then the Kiwanis could conceivably have a right to assert the vagueness doctrine. But the Jaycees has no right to assert the doctrine in this case.

FEB 27 1984

ALEXANDER L. STEVAS.

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, HUBERT H. HUMPHREY III,
and GEORGE A. BECK,

Appellants,

—v.—

THE UNITED STATES JAYCEES,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE NATIONAL ORGANIZATION FOR
WOMEN, AMERICAN JEWISH COMMITTEE, CENTER FOR CON-
STITUTIONAL RIGHTS, COALITION OF LABOR UNION WOMEN,
CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND,
EQUAL RIGHTS ADVOCATES, INC., NATIONAL CONFERENCE OF
BLACK LAWYERS, NATIONAL CONFERENCE OF WOMEN'S BAR
ASSOCIATIONS, NATIONAL FEDERATION OF BUSINESS AND
PROFESSIONAL WOMEN'S CLUBS, INC., NORTHWEST WOMEN'S
LAW CENTER, WOMEN EMPLOYED, WOMEN'S ACTION AL-
LIANCE, INC., WOMEN'S BAR ASSOCIATION OF THE STATE OF
NEW YORK, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S LAW
PROJECT, WOMEN'S LEGAL DEFENSE FUND AND WOMEN U.S.A.**

IN SUPPORT OF REVERSAL

CHARLOTTE M. FISCHMAN
SCOTT D. HELLER
ABBE L. DIENSTAG
Kramer, Levin, Nessen,
Kamin & Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

MARSHA LEVICK
JUDITH I. AVNER
Counsel of Record
LYNN HECHT SCHAFRAN
NOW Legal Defense and
Education Fund
132 West 43rd Street
New York, New York 10036
(212) 354-1225

Attorneys for Amici Curiae

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	(iii)
<u>STATEMENT OF THE CASE</u>	1
<u>INTEREST OF AMICI</u>	4
<u>SUMMARY OF ARGUMENT</u>	6
I THE JAYCEES IS A LEADERSHIP TRAINING ORGANIZATION INTIMATE- LY TIED TO ADVANCEMENT IN BUSI- NESS AND CIVIC LIFE	10
A. The Jaycees offers leadership training leading to advancement in business and civic life	11
B. Membership in the Jaycees enhances members' career opportunities by providing affiliation with a network of upwardly mobile peers and access to the leaders of the community.....	18
II THE FIRST AMENDMENT DOES NOT PREVENT THE STATE OF MINNESOTA FROM COMPELLING THE JAYCEES TO COMPLY WITH STATE LAW BANNING SEX DISCRIMINATION	30
A. The discriminatory policies of the Jaycees are not constitutionally protected by a right of freedom of association.....	32

	<u>Page</u>
B. State insistence upon compliance with its anti-discrimination law does not infringe upon the Jaycees' freedom of speech, petition, and assembly.....	37
C. Membership organizations such as the Jaycees do not enjoy a per se exemption from the application of anti-discrimination laws	43
D. The Eighth Circuit has impaired the ability of the State of Minnesota to function in an area of vital local concern	51
 III THE EIGHTH CIRCUIT ERRED IN HOLDING THAT THE MINNESOTA HUMAN RIGHTS ACT AS INTERPRETED BY THE STATE'S HIGHEST COURT IS UNCONSTITUTIONALLY VAGUE	 56
The Minnesota Supreme Court articulated clear standards for determining whether a civic organization falls within the State's Human Rights Act	57
<u>CONCLUSION</u>	64
<u>APPENDIX</u>	a-1
<u>Statements of Interest</u>	a-1

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Aboud v. Detroit Board of Education, 431</u> <u>U.S. 209 (1977)</u>	35
<u>Boule v. City of Columbia, 378 U.S. 347</u> <u>(1964)</u>	61
<u>Branzburg v. Hayes, 408 U.S. 665</u> <u>(1972)</u>	42
<u>Brown v. Loudoun Golf & Country Club,</u> <u>Inc., 573 F. Supp. 399 (E.D. Va.</u> <u>1983)</u>	45
<u>Brown v. Socialist Workers '74 Campaign</u> <u>Committee, 459 U.S. 87, 103 S. Ct.</u> <u>416 (1982)</u>	34
<u>Buckley v. Valeo, 424 U.S. 1</u> <u>(1976)</u>	35
<u>City of Los Angeles v. Lyons, 103 S. Ct.</u> <u>1660 (1983)</u>	52-53
<u>Civil Service Commission v. National</u> <u>Association of Letter Carriers, 413</u> <u>U.S. 548 (1973)</u>	60
<u>Coates v. City of Cincinnati, 402 U.S.</u> <u>611 (1971)</u>	60
<u>Cornellius v. Benevolent Order of Elks,</u> <u>382 F. Supp. 1182 (D. Conn.</u> <u>1974)</u>	44

	<u>Page</u>
<u>Curran v. Mount Diablo Council of the Boy Scouts of America</u> , 147 Cal. App. 3d 717, 195 Cal. Rptr. 325 (1983)	47
<u>Daniel v. Paul</u> , 395 U.S. 298 (1969)	45
<u>Democratic Party v. Wisconsin</u> , 450 U.S. 107 (1981)	35
<u>Fletcher v. United States Jaycees</u> , Nos. 78-BPA 0058-0081 (Mass. Comm'n Against Discrimination Jan. 27, 1981)	31n
<u>Giaccio v. Pennsylvania</u> , 382 U.S. 399 (1966)	60
<u>Grayned v. City of Rockford</u> , 408 U.S. 104 (1972)	58
<u>Healy v. James</u> , 408 U.S. 169 (1972)	34
<u>Heart of Atlanta Motel, Inc. v. United States</u> , 379 U.S. 241 (1964)	51
<u>Hoffman Estates v. Flipside, Hoffman Estates</u> , 455 U.S. 489 (1982)	61,62
<u>In re Primus</u> , 436 U.S. 412 (1978)	35-36
<u>Inwood Laboratories v. Ives Laboratories</u> , 456 U.S. 844 (1982)	39
<u>Knutson v. Brewer</u> , 619 F.2d 747 (8th Cir. 1980)	60-61

	<u>Page</u>
<u>Kusper v. Pontikes</u> , 414 U.S. 51 (1973)	35
<u>Marchioro v. Chaney</u> , 442 U.S. 191 (1979)	42
<u>Minnesota v. United States Jaycees</u> , (Minn. Dept. of Human Rights Oct. 9, 1979)	passim
<u>NAACP v. Alabama</u> , 357 U.S. 449 (1958)	34
<u>NAACP v. Button</u> , 371 U.S. 415 (1963)	36
<u>National Organization for Women, Essex County Chapter v. Little League Baseball, Inc.</u> , 127 N.J. Super. 522, 318 A.2d 33 (App. Div.), <u>aff'd</u> , 67 N.J. 320, 338 A.2d 198 (1974)	47
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	<u>Page</u>
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	<u>Page</u>
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42 U.S.C. § 2000a	51
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	<u>Page</u>
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STATEMENT OF THE CASE

The United States Jaycees (the "U.S. Jaycees" or "Jaycees") is a civic organization of some 300,000 members with numerous local chapters nationwide. The U.S. Jaycees refuses to admit women to full membership, according them only associate status. Associate members are ineligible to vote, hold office or receive awards. The issues to be resolved in this case are whether application to the Jaycees of the Minnesota Human Rights Act (the "Act"), Minn. Stat. Ann. §§ 363.01-.14 (West 1966 & Supp. 1983), which prohibits sex discrimination in places of public accommodation, unconstitutionally interferes with the Jaycees' First Amendment rights and whether, as applied to the Jaycees, the Act is unconstitutionally vague.

Since 1974 and 1975, the Minneapolis and St. Paul chapters of the Jaycees have admitted women as full members, in violation of the rules of the national organization. When the national organization threat-

ened in 1978 to revoke the charters of these chapters, the chapters filed charges with the Minnesota Department of Human Rights claiming violation of the Minnesota Human Rights Act. The Act prohibits sex discrimination in places of public accommodation and defines place of public accommodation to include "a business ... facility of any kind ... whose goods ... [and] privileges ... are ... sold or otherwise made available to the public."

Hearing Examiner George Beck held in-depth hearings on the claims against the Jaycees and on October 9, 1979 issued a decision finding that the Jaycees was a place of public accommodation whose discriminatory practices violated the Minnesota Human Rights Act. The U.S. Jaycees was enjoined from revoking the local chapters' charters and from discriminating against any members or applicants for membership on the basis of sex. Minnesota v. United States Jaycees

(Minn. Dep't of Human Rights Oct. 9, 1979) ("DHR Findings" and "DHR Memorandum"), at A-93.^{1/}

The Jaycees then instituted an action in federal district court claiming that application of the Minnesota Human Rights Act violated a constitutionally protected right of freedom of association, and, subsequently, that the Minnesota statute was unconstitutionally vague. Under the procedure of Minn. Stat. Ann. § 480.061(3) (West 1966 & Supp. 1983), the district court certified to the Minnesota Supreme Court the question of whether the Jaycees was a place of public accommodation within the meaning of Minn. Stat. Ann. § 363.01 (18). The Minnesota Supreme Court answered affirmatively. United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981). The district court then upheld the application of the Minnesota Human Rights Act to the Jaycees, finding that the State's compelling interest in prohibiting sex discrimination outweighed any associ-

^{1/} A- refers to Appellants' Appendix.

ational rights of the Jaycees and rejecting the Jaycees' vagueness claim. 534 F. Supp. 766 (D. Minn. 1982).

A divided panel of the Eighth Circuit, Chief Judge Lay dissenting, reversed. The lower court rejected the findings of the district court and the Minnesota Supreme Court that the Jaycees was a business organization and held that the Jaycees was a public advocacy group whose right of association and First Amendment rights were violated by application of the Minnesota Human Rights Act and, in the alternative, that the Act was unconstitutionally vague as applied. 709 F.2d 1560 (8th Cir. 1983). A petition for rehearing en banc was rejected by an equally divided Eighth Circuit on August 1, 1983. (Appellants' Appendix at A-131). The appeal to this Court ensued. Probable jurisdiction was noted on January 9, 1984.

INTEREST OF AMICI

This brief amicus curiae is submitted on behalf of the National Organization for Women,

American Jewish Committee, Center for Constitutional Rights, Coalition of Labor Union Women, Connecticut Women's Educational and Legal Fund, Equal Rights Advocates, Inc., National Conference of Black Lawyers, National Conference of Women's Bar Associations, National Federation of Business & Professional Women's Clubs, Inc., Northwest Women's Law Center, Women Employed, Women's Action Alliance, Inc., Women's Bar Association of the State of New York, Women's Equity Action League, Women's Law Project, Women's Legal Defense Fund and Women U.S.A. in support of Appellants' position that the State of Minnesota may constitutionally apply its Human Rights Act to the Jaycees.^{2/} These organizations oppose gender-based discrimination and recognize the importance of equal access for women to organizations like the Jaycees.

^{2/} The interest of the amici curiae is set forth in the Appendix to this brief.

Consent to file this brief on behalf of the named organizations has been obtained from the parties pursuant to Supreme Court Rule 36.2. Letters of consent are being filed together with this brief.

SUMMARY OF ARGUMENT

The U.S. Jaycees is a leadership training organization intimately tied to advancement in business and civic life. It provides leadership training by offering courses in such areas as management skills and public speaking, and providing members with various opportunities to exercise and thereby develop their leadership skills through community projects and as officers, directors, and committee chairmen. Female and male members of the Jaycees have pointed to the personal and professional gains they have realized as a result of participating in the leadership-building programs of the Jaycees. Because the Jaycees members are in the early stages of their careers, the opportunities provided by the Jaycees to know and work

with peers and business and civic leaders in the community are critical to future job success. Serving as an officer of the Jaycees, which women, as associate members may not do, further enhances this opportunity to make contacts among community leaders.

Full participation in these opportunities is equally important for women. Recent studies of college students amply demonstrate growing convergence of men's and women's career goals including the identification of career as their highest priority. To deny women leadership positions, voting rights, and awards in organizations like the Jaycees is to place women at a significant competitive disadvantage in their career development.

Current constitutional jurisprudence does not prevent the state of Minnesota from compelling the Jaycees to comply with Minnesota law prohibiting sex discrimination. The Constitution recognizes a protected freedom of association, but only when tied to the

exercise of an explicit First Amendment right. This Court has not extended such protection to organizations like the Jaycees, which primarily engage in business or commercial activities. Although the Jaycees has on occasion taken political positions, such stands are peripheral to the organization's core purpose. Because the political pronouncements of the Jaycees are gender neutral, application to the Jaycees of Minnesota law banning sex discrimination would not infringe on any First Amendment activities in which the Jaycees do engage.

The fact that the Jaycees is a membership organization does not in itself insulate the Jaycees from anti-discrimination law. Moreover, since the Jaycees currently admits women as associate members, compelling it to grant full equality to women does not drastically interfere with the Jaycees or threaten other, truly private organizations. The interest of the State in applying its Human Rights Act to the Jaycees is

one of vital local concern and should not be impaired by the federal courts.

The Minnesota Human Rights Act is not unconstitutionally vague. The Minnesota Supreme Court, interpreting its own statutes, articulated clear standards for determining application of the statute to civic organizations. There is ample notice which allows the public to distinguish readily between acts that are permissible and those that run afoul of the law.

I.

THE JAYCEES IS A LEADERSHIP TRAINING ORGANIZATION INTIMATELY TIED TO ADVANCEMENT IN BUSINESS AND CIVIC LIFE

After two days of hearings, eight witnesses, and 100 exhibits, DHR Memorandum, at A-94, the Minnesota Department of Human Rights concluded that the Jaycees was a place of public accommodation within the meaning of the State Human Rights Act and ordered the Jaycees to comply with the Act by admitting women to full membership. The Hearing Officer perceptively recognized that "[t]o deny [Jaycees] training and help in advancement to women in business while it is fully available to men would place women at a significant competitive disadvantage." DHR Memorandum, at A-121. These conclusions are amply supported by the record.

- A. The Jaycees offers leadership training leading to advancement in business and civic life.

Providing leadership training is the primary purpose of the U.S. Jaycees. The organization advertises as its motto, "Build Tomorrow's Leaders Today,"^{3/} and describes itself as "an action organization with the purpose and object of building leadership."^{4/} Its recruiting materials boast that "[t]he United States Jaycees has provided thousands of eager young leaders to America's vast business complex."^{5/} This self-professed purpose was accurately perceived by the Minnesota Department of Human Rights: "The by-laws

^{3/} Simpson, Jaycees Challenged on 'Men Only' Rule, Working Woman, Sept. 1979, at 61.

^{4/} U.S. Jaycees, Service to Humanity: The Jaycee Future 7 (1969) (hereinafter Service to Humanity). One Jaycees chapter president has stated, "The Jaycees does not market itself as a boys' club. It is advertised as a leadership training organization." Simpson, "Jaycees Challenged on 'Men Only' Rule," supra, at 63.

^{5/} Service to Humanity, at 2.

of the U.S. Jaycees make it clear that they are not merely an organization designed to engage in good works. They are rather an organization primarily designed to train future leaders for civic and business responsibilities." DHR Memorandum, at A-121, quoting Junior Chamber of Commerce of Kansas City v. The Missouri State Junior Chamber of Commerce and the U.S. Jaycees, 508 F.2d 1031, 1035 (8th Cir. 1975) (Heany, J., dissenting).^{6/}

The Jaycees provides leadership training in two ways: (1) courses in areas such as management skills and public speaking, and (2) opportunities to exercise and thereby develop leadership skills through community projects and as officers, directors or committee chairmen.

^{6/} Indeed, nowhere in hearings before the Minnesota Department of Human Rights was it suggested that the Jaycees is a political advocacy group.

The leadership training courses, which the Jaycees calls "individual development" programs, are designed by the national headquarters in Tulsa. DHR Findings No. 19, at A-102 to A-103. The Jaycees course entitled "Personal Dynamics" teaches self-awareness and evaluation, goal setting, personal planning and personal skills; "Communication Dynamics" deals with problems such as listening skills, human relations and letter writing; "Speak-Up" is a public speaking course; "Leadership Dynamics" discusses leadership styles and skills and personnel management. See Complainants' Exhibits 22, 23, 41, 53, listed at A-125 to A-127. A small fee is charged for the materials used in these courses, which include workbooks, a chairman's guide and diplomas. Complainants' Exhibit 33, listed at A-126.

Jaycees members are well aware of the value of these courses. One Minnesota Jaycees member stated in testimony before the Department of Human Rights that the Jaycees' "Speak-Up" program developed

her speaking abilities and aided in her presentations at work. DHR Findings No. 17, at A-101 to A-102. Indeed, a Jaycees recruitment manual coaches recruiters to use the following dialogue:

What other organization will provide you with a personal development education for \$25.00 a year? Just being in the Speak-Up program and being able to speak more effectively could mean a \$25.00/month raise in pay the next time you and your boss talk about salaries.

See Complainants' Exhibits 24, 7, listed at A-125. On the basis of such evidence, the Minnesota Department of Human Rights correctly found that "the payment of dues by members and the return of leadership training programs by the Jaycees is not unlike the purchase of training courses from a for-profit organization such as Dale Carnegie." DHR Memorandum, at A-115.

In addition to the instructional program provided through formal courses, the U.S. Jaycees offers its members a laboratory with unique opportunities to exercise and develop leadership skills through committee work, community service projects and hold-

ing office in the organization. Women who have been admitted to membership in the Jaycees have pointed to the personal and professional gains they have realized as a result of participating in a leadership-building volunteer group that cuts across career lines. See Simpson, Jaycees Challenged on 'Men Only' Rule, supra, at 65. One Minnesota Jaycee testified that through her Jaycee participation she acquired speaking, leadership and organizational skills at a young age that helped her to gain a promotion. DHR Findings No. 16, at A-100 to A-101. Another Minnesota woman, who joined the Jaycees at her supervisor's request, described the organization as offering "probably the best leadership training for women in the country." The All-Male Club: Threatened on All Sides, Business Week, August 11, 1980, at 90, 91.

Clearly the Jaycees' leadership training, although described in the organization's publications as "Service to Humanity," does not take place in a rarified .

atmosphere of purely altruistic concerns.^{7/} Indeed, the Jaycees was "originally organized for the sole purpose of promoting the business interests of its members." New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 858 (2d Cir. 1975).

The value of the Jaycees' leadership training services in business has been acknowledged by the business community itself. Corporations frequently sponsor their employees for membership, DHR Findings No. 23, at A-105, and encourage employees to become Jaycees.^{8/} The benefit to the corporation comes from

^{7/} Service to Humanity, supra, is the title of a Jaycees recruitment brochure. Although many Jaycees projects are of great value to the community, there is no question that the Jaycees member derives very tangible benefits directly affecting his business life by participating in those projects.

^{8/} Minnesota Jaycee Sally Pederson testified that she was advised by the personnel department to join the Jaycees when she inquired about advancement from her employer. Pederson subsequently obtained two promotions with a resume replete with Jaycees activities. She was questioned extensively about those activities during the (footnote continued)

the improved management skills of its employees and the publicity the corporation obtains when one of its employees receives public recognition for participation in a Jaycees public service project.

Individuals who join the Jaycees are seeking to enhance their career potential through both leadership training courses and the experience gained in running large-scale volunteer projects in an organization with high visibility and respect in the community. Members do not use the Jaycees as a vehicle for taking positions on public issues, except as such incidental activity may lead to visible public projects. The value of the Jaycees' leadership training services was summarized by the Department of Human Rights' Hearing Examiner:

The women who testified in this proceeding ... gave vivid examples of the way that regular membership and participation at the officer or director level in the Jaycees directly benefited their business career

promotion interviews. DHR Findings No. 18, at A-102.

[sic]. The record shows that not only have these women benefited generally from the skills that they acquired in the Jaycees, but participation has also led to promotion.

DHR Memorandum, at A-120 to A-121. The same perception was stated more succinctly by John Kendrick, President of the Boston Jaycees: "My own value in the marketplace has increased dramatically by my Jaycees experience." Simpson, Jaycees Challenged on 'Men Only' Rule, supra, at 68.

- B. Membership in the Jaycees enhances members' career opportunities by providing affiliation with a network of upwardly mobile peers and access to the leaders of the community.

One of the most important services provided by the Jaycees to its members is affiliation with a network of upwardly mobile peers and access to the business and civic leaders of the community. Although not formally advertised in any Jaycees Handbook, the value of this service is well recognized. It provides members with an entree to the "Old Boys Network."

The Old Boys Network is that series of link-ages with influential elders, ambitious peers and younger men on their way up which men develop as they move through school, work, professional and community service organizations, and private clubs. It provides men with knowledgeable allies who help them to advance in their careers, teach them who the cast of characters is and how to behave in a new position, and assist them in getting the earliest news of job openings, business opportunities and financial grants.

The importance of access to such a network cannot be overestimated.^{9/} The Detroit Free Press has

^{9/} Members of these networks are fond of denying their importance, and even their existence, but trenchant observers of American society have no doubt of their existence, their importance, or where the best places are to join them. In John O'Hara's From the Terrace, the first conversation between the protagonist and his industrialist father after the former's return from World War II begins with a discussion of what clubs the young man should join and at what point in his career. J. O'Hara, From the Terrace, 328 (Popular Library ed. 1958). See also Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum (footnote continued)

described the Old Boys Network as "where the power really is . . . the mechanism that gives men a chance to push the right buttons and meet the right people at the right time." O'Brien, Women Helping Women, Detroit Free Press, Nov. 13, 1978. The Washington, D.C. Old Boys Network has been characterized as "a power source men have used since the beginning here; the who-do-you-know pipeline. . . . The 'Old Boys Network' that runs the capital, irrespective of political creed. . . ." Causey, Old Girl Network Growing, Washington Post, Oct. 5, 1978. According to Meryl James-Gray, international public relations director of Avon Products, "networking is one essential way in which the corporate system works." Moses, Networking, Black Enterprise, Sept. 1980, at 29, 30. Promotions and high-level jobs are often based on the kind of personal relationships that are forged in the Old Boys Network. The Bureau of

and the Myth of Full Equality, 18 Harv. C.R.-C.L. L. Rev. 321, 334 (1983) ("few assets are as valuable as membership in the right men's club for climbing the professional ladder").

Labor Statistics reported that almost one third of all jobs held by males comes through personal contacts. U.S. Bureau of Labor Statistics, Bull. No. 1886, Job Seeking Methods Used by American Workers, Table 3 (1972). Most people believe that the percentage is even higher for high-level jobs. C. Kleiman, Women's Networks 2 (1980).

Women are as much in need of access to career enhancing networks as are men. The numerous studies of college students that have been conducted over the past fifteen years have demonstrated a growing convergence in men's and women's career and family goals. See, e.g., Johnson, For Students a Dramatic Shift in "Goals", N.Y. Times, Feb. 28, 1983, at B5, col. 2; Devanna, Male/Female Careers, The First Decade, Columbia University Graduate School of Business, Center for Research in Career Development (1984) (the "Columbia Study"). Ninety percent of both men and women college students plan to obtain graduate degrees, and one-third of both women and men expect their

careers to be their highest priority in 15 to 20 years. The Columbia Study of male and female graduates of the classes of 1969-1972 revealed that men and women graduates chose the same types of jobs upon graduation. Further, there was no evidence that women work fewer hours or drop out of the labor force due to marriage or childbirth, explanations often given for the small representation of women in the ranks of management. The study also revealed a strong correlation between mentoring and success for women. In fact 72% of the women without mentors were in the low success group (as defined by salary). In a recent study of male and female managers in two unnamed companies, researchers found that women and men both had high power and achievement drives, and strong motivation to manage. Harlan & Weiss, Moving Up: Women in Managerial Careers, Final Report, Wellesley College Center for Research on Women (1981).

Aspirations and drive, however, are not enough for women seeking to equal the professional

achievements of their male counterparts. "[W]ho knows whom...is important [in career advancement]. In this regard, women suffer because men tend to socialize in activities which exclude women." Bartlett, Poulton-Callahan, Somers, What's Holding Women Back, Management Weekly, November 8, 1982. Women need the contacts, networking, and professional support provided by organizations like the Jaycees.

Members of the Jaycees automatically become a part of an extensive and influential network of current Jaycees. Because the Jaycees is a national organization with more than 300,000 members in 9,000 local chapters, this network reaches far beyond an individual member's chapter to provide ties to Jaycees members throughout the country. Locally, the Jaycees' program provides many opportunities for each Jaycees member to know and work with peers in the community. These individuals are in the early stages of their careers

and share aspirations for career advancement.^{10/} At the same time there is enough range in the organization's age parameters to allow the senior members to provide the juniors with advice, contacts, and a wide variety of business opportunity and employment. An Alaska insurance broker who participates in several professional groups has stated that no group matched the Jaycees for making professional contacts and that many of her clients had been referred to her by other Jaycees. Simpson, Jaycees Challenged on 'Men Only' Rule, supra at 65.

Every Jaycee is also part of a network which encompasses all past members of the Jaycees. Many of these alumni hold influential positions in the

^{10/} Although Jaycee membership is open to any male between the ages of 18 and 35, many Jaycees are young business and professional men who aspire to leadership roles. "The evidence shows in this case over 50% of the membership in St. Paul and Minneapolis Jaycees chapters are in business management occupations" Brief of the United States Jaycees at 9, United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981).

business and civic arenas, locally and across the country. It is these direct connections with the sources of community power, the decision makers of the business and civic worlds, that are so critical for future advancement.

The Jaycees network provides its members with access to local community leaders not only through links to Jaycees "graduates" but also through the many community service projects sponsored by the local chapters. The projects range from providing free holiday dinners to CPR training.^{11/} In the course of carrying out these projects, Jaycees members meet and work

^{11/} DHR Findings No. 19 and 20, at A-102 to 104. Projects prepared by the U.S. Jaycees include a CPR training program which is open to the public and a program in governmental affairs. DHR Findings No. 19, at A-103. In Minnesota locally developed projects include an annual free Christmas dinner and the Patty Berg golf clinic. DHR Findings No. 20, at A-103 to A-104. Other local projects across the nation include the Canton, Ohio chapter's development of a new income tax which financed the construction of a new expressway and city hall and spurred housing renewal. Service to Humanity, supra, at 8.

closely with the business and civic leaders of their communities, individuals whom it is doubtful these young Jaycees would otherwise have the opportunity to meet and who may well have a major impact on their lives. Serving as an officer of the Jaycees, which women, as associate members, may not do, further enhances this opportunity to make contacts among community leaders. For example, the president of the St. Paul Jaycees sits on the St. Paul Chamber of Commerce as an ex-officio member. Transcript of Apr. 23-24, 1979, at 179, Minnesota v. United States Jaycees, (Minn. Dep't of Human Rights Oct. 9, 1979).

The Jaycees is able to provide its members with access to the business and civic leaders of the community because of the recognition and respect the organization enjoys in the community.^{12/} A Jaycees

^{12/} The Department of Human Rights found that "[a] local chapter whose charter is revoked would suffer loss of the substantial goodwill and name recognition of the title 'Jaycees'." DHR Findings No. 25, at A-106.

recruitment brochure boasts "In Canton, Ohio, being a Jaycee is important. Industry considers it important. City officials and news media consider it important." Service to Humanity, supra, at 8. And a Jaycees chapter president has said, "There's a lot of validity to the Jaycees' motto 'Build Tomorrow's Leaders Today'....Corporate doors open when you say you're from the Boston Jaycees." Simpson, Jaycees Challenged on 'Men Only' Rule, supra, at 68.

Affiliation with a network of past and present members and access to community leaders is not simply an incidental aspect of Jaycees membership. The Jaycees advertises its ability to plug a new member into the community quickly and at the highest levels. Indeed, one Jaycees recruitment publication tells the story of "an average Jaycee," a thirty-year old man transferred to a new town, uneasy because he knows no one and encouraged by his boss to join the Jaycees. After attending his first meeting, this "average Jaycee" is approached by a committee chairman and asked for

his opinions and suggestions about the previous night's discussion, joins the committee, assumes "a position of leadership," and in short order finds himself "confronting community officials with the key problems that the citizens had cited which the Jaycees could do something about." Service to Humanity, supra, at 3-4.

Denying women the right to exercise membership privileges such as voting, holding office or receiving awards creates a "together but unequal" environment with many serious disadvantages to the second-class participants. Relegating women to such secondary citizenship in organizations such as the Jaycees denies them the substantially greater leadership training and contacts development afforded those who serve as officers and directors, creates feelings of inferiority in women, and reinforces the handmaiden mentality in men — the notion that women are always the Women's Auxilliary, there to serve without praise or pay. Moreover, to deny women leadership positions and awards in an organization like the Jaycees, which

focuses so intensely on competition and honors to spur members' achievement, is to deny women recognition in every sense of the word.

II

THE FIRST AMENDMENT DOES NOT PREVENT THE STATE OF MINNESOTA FROM COMPELLING THE JAYCEES TO COMPLY WITH STATE LAW BANNING SEX DISCRIMINATION

In ruling the application of the Minnesota Human Rights Act to the membership practices of the Jaycees unconstitutional, the Eighth Circuit has essentially precluded the State of Minnesota from effectuating its important policy of eradicating sex discrimination in businesses and marketplaces within the State. Minnesota has been ordered to condone the discriminatory practices of the Jaycees and ignore an administrative and trial record that demonstrate the deleterious effect that this will have on the ability of women to compete for career opportunities in the State. The Court of Appeals' decision mischaracterizes the factual record with respect to the operation of the Jaycees in Minnesota and rests on freedom of asso-

ciation and First Amendment doctrine inconsistent with this Court's jurisprudence.

The Eighth Circuit stands alone, among the courts that have considered this case, in invalidating the application of the Minnesota Human Rights Act to the Jaycees. The Minnesota Supreme Court confirmed that the Jaycees was a place of public accommodation within the meaning of the State's anti-discrimination statute because of the organization's vigorous but non-selective recruitment policies and the organization's emphasis on leadership and management training programs.^{13/} Addressing the constitutionality of the Human Rights Act as applied to the Jaycees, the district court

^{13/} Like the tribunals in Minnesota, the Massachusetts Commission Against Discrimination has held the Jaycees subject to public accommodations laws in that state. See Fletcher v. U.S. Jaycees, Nos. 78-BPA-0058-0081 (Mass. Comm'n Against Discrimination Jan. 27, 1981). A contrary result was reached in U.S. Jaycees v. Richardet, 686 P.2d 1008 (Alaska 1983) (reversing lower court); U.S. Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. 1981) (reversing lower court).

declared, "Minnesota's interest in prohibiting public business facilities from sex discrimination outweighs any protected right of freedom of association the Jaycees may have." 534 F. Supp. at 774. The decision of the Eighth Circuit overturning these decisions should be reversed, lest it signal to sister states a backward trend in the national move towards equal opportunities for both sexes.

- A. The discriminatory policies of the Jaycees are not constitutionally protected by a right of freedom of association.

In seeking to protect the Jaycees from the reach of the State's anti-discrimination laws, the Eighth Circuit has relied upon an unusually broad and amorphous concept of freedom of association. Stating that the Circuit's "own cases have recognized a right of association in ... broad terms" and that both its opinions and those of this Court have not restricted rights of association "to groups whose activities fall clearly

within the specific guarantees of the First Amendment," 709 F.2d at 1568, the lower court has held in substance that the discriminatory practices of the Jaycees are constitutionally protected because they are practiced by a group rather than by individuals. Group practice of discrimination, however, is a greater evil than diffuse and unconnected bias exhibited by individuals. Women are disadvantaged by exclusion from full membership in the Jaycees precisely because they cannot benefit from the full range of contacts, leadership experience, and organizational work that the Jaycees has to offer.

Review of the Court's pronouncements on freedom of association reveals that the Court has extended constitutional protection to association that is tied to the textually explicit First Amendment rights of freedom of speech, petition, and assembly. Protection of beliefs lies behind many of the Court's cases. Thus, the Court has held on numerous occasions that a state cannot compel disclosure of affiliation with groups organized to advance particular, usually unpopular,

beliefs, because to do so would stifle freedom of speech. See, e.g., Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 103 S. Ct. 416, 419-20 (1982) ("The Constitution protects against compelled disclosure of political association and beliefs."); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960) ("to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech"); NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.") Freedom of association has been invoked to forbid states from depriving educational forums to groups solely because of the beliefs they espouse, Widmar v. Vincent, 454 U.S. 263, 269 (1981); Healy v. James, 408 U.S. 169, 181 (1972), or forcing a union member to contribute in support of causes foreign to his

beliefs. Abood v. Detroit Board of Education, 431 U.S. 209, 233 (1977).

Similarly, it has been held that government may not infringe on the right to associate in political parties, a right clearly related to freedom of expression. See, e.g., Democratic Party v. Wisconsin, 450 U.S. 107, 121 (1981) ("First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State"); Buckley v. Valeo, 424 U.S. 1, 22 (1976) ("associations ... effectively amplifying the voice of their adherents [is] the original basis for the recognition of First Amendment protection of the freedom of association"); Kusper v. Pontikes, 414 U.S. 51, 57 (1973) ("The right to associate with the political party of one's choice is an integral part of . . . basic constitutional freedom"). Associational rights have also been implicated when government has sought to curtail "collective activity undertaken to obtain meaningful access to the courts," In re Primus, 436 U.S. 412, 426

(1978) quoting United Transportation Union v. Michigan Bar, 401 U.S. 576, 585 (1971), a freedom related to "the right to assemble peaceably and to petition for redress of grievances." See United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 222 (1967). See also NAACP v. Button, 371 U.S. 415, 430-31 (1963) ("the First and Fourteenth Amendments protect certain forms of orderly group activity ... association for litigation may be the most effective form of political expression").

These cases illustrate the contours of the right of association. The Court has not established a constitutional right of group association that turns only on the fact that individuals have chosen to pursue collectively interests otherwise not entitled to constitutional protection. For group activity to be protected it must embody appropriate First Amendment content. The Jaycees does not enjoy a constitutional shield for its discriminatory practices simply because its members have joined together to hone their career

skills, provide themselves with civic exposure, and enhance their opportunities in the business world.

- B. State insistence upon compliance with its anti-discrimination law does not infringe upon the Jaycees' freedom of speech, petition and assembly.

The Eighth Circuit has also relied upon traditional freedom of association principles connected with First Amendment exercise to prohibit application of the Minnesota Human Rights Act to the Jaycees. Contrary to every other tribunal that has considered this case, the Eighth Circuit has concluded that the Jaycees are entitled to First Amendment protection as an organization devoted to the espousal of political beliefs and social ideology. In this regard the Eighth Circuit has committed errors of fact and law and should be reversed.

The district court, relying in part on the testimony of Arthur W. Boulette, Executive Vice

President of the Jaycees and the organization's historian, arrived at the following factual description of the Jaycees:

The Jaycees considers itself to be a young men's leadership training organization, serving the goals of individual development, community development, and development of management ability. It claims that the training it offers gives members an advantage in business and civic advancement, and businesses are in fact sometimes requested to pay the dues for individual members ... In addition, the Jaycees from time to time issues various policy statements on political and social issues

534 F. Supp. at 769 (footnote omitted).

Rule 52(a) of the Federal Rules of Civil Procedure provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." As this Court has recently observed, "Because of the deference due the trial judge, unless an appellate court is left with the definite and firm conviction that a mistake has been

committed,' United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), it must accept the trial court's findings." Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 855 (1982) (footnote omitted). Failing to heed the direction of the Federal Rules and this Court, the Eighth Circuit has improperly substituted its own factual characterization of the Jaycees for that of the district court.

The trial court and other tribunals justifiably found the political and ideological pronouncements of the Jaycees to be only occasional and peripheral to the Jaycees' principal business activities of recruitment and training. As the record demonstrates, members do not join the Jaycees in order to engage in political advocacy, nor do corporations sponsor their employees' membership in order to promote political ends. The Jaycees stresses training and exposure, not opportunity for political expression, in its recruitment of new members. Indeed, in its brief before the Minnesota Supreme Court, the Jaycees did not make the slightest reference

to its political pronouncements. Brief of the United States Jaycees, at 28-35, United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981).

The Eighth Circuit, acting as if it were a court of first instance, exaggerated the Jaycees' political posturing beyond all reasonable bounds, characterizing it as a major focus of the Jaycees' endeavors. The appellate court made the further factual finding that "all of [the Jaycees'] doings are colored by the adoption and recitation at meetings of the Jaycee 'Creed' ... which espouses 'faith in God' and 'free enterprise' and declares that 'the brotherhood of man transcends the sovereignty of nations.'" 709 F.2d at 1570. The hollowness of this conclusion is readily appreciated when the Jaycee 'Creed' is juxtaposed with the Jaycees recruitment literature which loudly announces "JAYCEES, THE PRODUCT you are selling, is outstanding from any angle. Jaycees is the 'best value' you can get." United States Jaycees v. McClure, 305 N.W.2d 764, 769 (Minn. 1981), quoting The Jaycees

Recruitment Manual (emphasis in original). As the record clearly demonstrates, the Court of Appeals' "conception of the Jaycees is based upon factual error." 709 F.2d at 1579-80 (Lay, C.J., dissenting).

The quantum of First Amendment activity in which the Jaycees does engage is not infringed upon by the application of the Minnesota Human Rights Act. An economically and socially oriented entity cannot, by occasional political pronouncement, insulate itself from the reach of anti-discrimination laws. Otherwise, virtually all anti-discrimination laws, both state and federal, could be evaded by issuing a few statements on public affairs.

Even groups that are primarily engaged in First Amendment activities must conform their conduct to laws of general application that do not impinge on any First Amendment exercise. "The [First] Amendment does not forbid [a] regulation which ends in no restraint upon expression or in any other evil outlawed

by its terms and purposes." Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 193 (1946). Thus press organizations are subject to the National Labor Relations Act, the Fair Labor Standards Act, the Sherman Act and general nondiscriminatory tax legislation. See Branzburg v. Hayes, 408 U.S. 665, 682-83 (1972). Similarly, the right to associate for political purposes is not infringed upon by state regulation of political parties that does not in fact burden the exercise of any political rights. See Marchioro v. Chaney, 442 U.S. 191 (1979).

The State of Minnesota does not seek to interfere with the Jaycees' occasional political pronouncements or dictate its ideologies. The political positions of the Jaycees cited by the Eighth Circuit in support of its ruling — support for the draft, the FBI, the United Nations, corporate income tax, the Hoover Commission, the vote for 18-year-olds and citizens of the District of Columbia — are striking for their gender

neutrality. See 709 F.2d at 1570. The "Jaycee Creed," heavily emphasized by the Eighth Circuit, 709 F.2d at 1570, contains nothing that espouses discrimination on the basis of sex. Women are presently admitted as associate members, presumably engaging in exchange of ideas with their male counterparts. The Eighth Circuit's mere speculation that full participation by women would alter the "philosophical cast [of the Jaycees]", 709 F.2d at 1571, is an insufficient basis upon which to preclude the State from applying its anti-discrimination law to the Jaycees.

- C. Membership organizations such as the Jaycees do not enjoy a per se exemption from the application of anti-discrimination laws.

The Jaycees has sought to invoke constitutional protection of its discriminatory practices with the argument that it is a private membership organization whose forced admission of women would portend government interference with practices and policies of

all private groups. The Jaycees' contention rests on the erroneous premises that a group qualifies as a private organization merely because it chooses to characterize itself as such and that the courts are precluded from or incapable of distinguishing between groups that are truly private and those that are not. Both the federal and state courts have refused to accept these premises. A membership group, such as the Jaycees, is not exempt from the application of anti-discrimination laws unless the group exhibits identifiable features of exclusivity.

Criteria have been developed in the federal courts for determining whether a group is truly private. Among the criteria are selectivity of the group in the admission of members, Tillman v. Wheaton - Haven Recreation Association, 410 U.S. 431, 438 (1973); Sullivan v. Little Hunting Park, 396 U.S. 229, 236 (1969); existence of limits on the size of membership, Nesmith v. YMCA, 397 F.2d 96, 102 (4th Cir. 1968); formality of membership procedures, Cornelius v. Benevolent Order of Elks, 382 F. Supp. 1182, 1203 (D. Conn. 1974); Wright

v. Cork Club, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970); attributes of self-government and member ownership, Daniel v. Paul, 395 U.S. 298, 301 (1969); and the absence of advertising directed to non-members, Runyon v. McCrary, 427 U.S. 160, 172 n.10 (1976). See also, Brown v. Loudoun Golf & Country Club Inc., 573 F. Supp. 399, 402-03 (E.D. Va. 1983) ("In determining whether an establishment is a truly private club . . . [t]he key factor is whether the club's membership is truly selective.").

Employing these criteria, the Minnesota Supreme Court found the Jaycees to be a public membership organization. This conclusion was amply supported by the record. Members are referred to as "customers," and membership in the organization is referred to in the organization's published material as "the product" or "the goods." Moreover, the sale of memberships occupies a tremendous amount of officers' time, and recruitment achievement is recognized in the organization's awards system, more than half of which deals with "record breaking performance in selling

memberships." United States Jaycees v. McClure, 305 N.W.2d 764, 771 (Minn. 1981). There are no published criteria by which members are selected, and no evidence in the record that any applicant for membership has ever been rejected — except women applying for "full" membership rather than "associate" membership. See 534 F. Supp. at 769.

Various other state courts have rejected the claims of open membership organizations that they were private groups immune from the states' public accommodations laws. A recent unanimous decision of the New York Court of Appeals, United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 465 N.Y.S.2d 871 (1983), relied upon many of the factors just enumerated to find an organization of power-boating enthusiasts subject to the state's laws against sex discrimination. Like the Jaycees, the Power Squadrons offered social, civic, and educational programs. The court noted that the group had "no plan or purpose of exclusivity other than sexual discrimination

... encourage[d] and solicit[ed] public participation in their programs, courses and membership ... [and did not] direct publicity exclusively and only to the members" 59 N.Y.2d at 413, 465 N.Y.S.2d at 877. A challenge to the constitutionality of the state civil rights law as applied to the Power Squadrons was summarily dismissed with the observation that " 'the constitution places no value on [private discrimination].' " 59 N.Y.2d at 414, 465 N.Y.S.2d at 877, quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973). Compare Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 717, 195 Cal. Rptr. 325 (1983) (Boy Scouts is a "business establishment" forbidden under California law from discriminating on the basis of sexual preference); National Organization for Women, Essex County Chapter v. Little League Baseball Inc., 127 N.J. Super. 522, 318 A.2d 33 (App. Div.), aff'd, 67 N.J. 320, 338 A.2d 198 (1974) (Little League held a "place of public accommodation" forbidden under New Jersey law from discriminating against girls); Shepherdstown

Volunteer Fire Department v. Swain, Nos. 15467, 15749 (W. Va. Sup. Ct. App. Nov. 10, 1983) (volunteer fire departments held not to be private clubs and thus to have violated West Virginia Human Rights Act prohibiting sex discrimination in places of public accommodation); Pollard v. Quinnipac Council, Boy Scouts of America, No. PA-SEX-37-3 (Conn. Comm'n Human Rights Jan. 4, 1984) (Boy Scouts, as a place of public accommodation, is forbidden from discriminating against applicant for scoutmaster on the basis of sex).

The Jaycees seeks to upset this established jurisprudence by presenting the Court with the specter of Minnesota's invading all kinds of membership organizations, from B'nai Brith to the Polish Women's Alliance. See Appellee's Motion to Affirm at 13. The records of neither these nor any other organizations are before the Court. The constitutional and statutory rights of each organization can only be determined after a detailed examination of the organization's practices

and policies, as the Minnesota tribunals and the district court have done with respect to the Jaycees.

The Jaycees' attempt to compare itself to other organizations is flawed for yet another reason. The Jaycees is not in fact the men's organization that it purports to be. The Jaycees does admit women to its ranks, albeit as associate members without the right to vote, hold office or obtain awards, but with the right to participate in all of the organization's activities. 534 F. Supp. at 769. Moreover, nothing that the Jaycees does — not its recruitment and training, not its internal decisionmaking, not its community projects, not its occasional political expression — is uniquely related to the interests of men. It is only by affixing to itself the label of a young men's group that the Jaycees defends its discriminatory policies. The State has done no more than insist that the Jaycees eliminate women's second class status within the organization. This is hardly a demand that drastically alters the nature of the organization, threatens the identity of other truly

homogeneous groups or rises to constitutional significance.

The judgment of the State embodied in the Minnesota Human Rights Act is entitled to a good deal more credit than the Jaycees allows. Minnesota has brought businesses like the Jaycees within the ambit of its discrimination laws because the State has correctly determined that such groups are commercially oriented entities which, like traditional places of public accommodation such as hotels and restaurants, have a significant public impact. It is absurd to posit that, if the decision of the Minnesota Supreme Court is allowed to stand, the State will blindly undertake to erase all ethnic, religious, and political pluralism within its jurisdiction.

The decision of the Minnesota Supreme Court applying the State's public accommodation law to the Jaycees is consistent with the proposition that the constitution provides no safe harbor against the applica-

tion of civil rights laws for enterprises operating in the public domain. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), a case upholding the constitutionality of the federal public accommodation statute, 42 U.S.C. § 2000a, the Court noted:

[N]o case has been cited to us where the attack on a state [public accommodation] statute has been successful, either in federal or state courts [T]he constitutionality of such state statutes stands unquestioned.

379 U.S. at 260. These statutes remained unchallenged until the decision in this case, the first instance in which a federal court has found a state public accommodation statute unconstitutional.

- D. The Eighth Circuit has impaired the ability of the State of Minnesota to function in an area of vital local concern.

Amici agree with the finding of the district court that "Minnesota's interest in preventing discrimination in public accommodations is compelling." That

interest is succinctly embodied in Minn. Stat. Ann. § 363.12(1)(3) (West 1966 & Supp. 1983) which declares, "It is the public policy of this state to secure for persons in this state, freedom from discrimination ... [i]n public accommodations because of ... sex" Discrimination against women in business and career advancement is not only repugnant to social and moral sensitivities, it also deprives the State of the full potential contribution of women to the State's economic growth and development.

This Court has long been sensitive to those aspects of our federal system which require the national government to tread carefully when called upon to interfere with state functions. See Railroad Commission v. Pullman Co., 312 U.S. 496, 498 (1941) (recognizing "sensitive area[s] of social policy upon which the federal courts ought not to enter" absent pressing exigency); Younger v. Harris, 401 U.S. 37, 44 (1971) (emphasizing "the notion of comity, that is a proper respect for state functions"). Just last term, in City of

Los Angeles v. Lyons, 103 S. Ct. 1660 (1983), the Court refused to sanction the issuance of an injunction against state law enforcement officials out of consideration of "normal principles of equity, comity, and federalism" and " '[t]he special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law.' " 103 S. Ct. at 1670, quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

This is not an instance in which a state has chosen to flout overriding federal law or policy. Congress has forbidden discrimination on the bases of race, religion, color, and national origin in places of public accommodations, 42 U.S.C. §§ 2000a to 2000a-6, and discrimination, including sex discrimination, in places of employment, 42 U.S.C. §§ 2000e to 2000e-17. Many states, however, have chosen to go further. At least thirty-eight states and the District of Columbia have public accommodation laws and more than half of these prohibit sex discrimination. Project, Discrimination in Access to Public Places: A Survey of State and

Federal Public Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215, 292-93 (1978).

The wisdom of allowing the states a free hand to legislate where national policy has not crystallized has been captured in the oft-quoted remarks of Justice Brandeis:

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also Whalen v. Roe, 429 U.S. 589, 597 & n.20 (1977) ("[W]e have frequently recognized that individual states have broad latitude in experimenting with possible solutions to problems of vital local concern."). The lower federal court should not be permitted to prevent the State of Minnesota from implementing its statutory solution to the

persistent problem of women's inability to compete effectively with men for career opportunity and advancement.

III.

**THE EIGHTH CIRCUIT ERRED IN
HOLDING THAT THE MINNESOTA
HUMAN RIGHTS ACT AS INTERPRETED
BY THE STATE'S HIGHEST COURT IS
UNCONSTITUTIONALLY VAGUE**

The Eighth Circuit has also invalidated the Minnesota Human Rights Act as applied to the Jaycees because, in its view, the state court "introduced such an element of uncertainty [into the statute] as to make it impossible for people of common intelligence to know whether their organizations are subject to the law or not." 709 F.2d at 1577. This vagueness analysis erroneously invalidated an otherwise unobjectionable statute, disregarding detailed statutory definitions, the reasoned interpretation of the statute by the State's highest court, and the judicial consensus sustaining substantially similar statutes.

The Minnesota Supreme Court articulated clear standards for determining whether a civic organization falls within the State's Human Rights Act.

The Minnesota Human Rights Act, which forbids sex discrimination in places of public accommodation defines public accommodation to include "a business ... facility of any kind ... whose goods ... [and] privileges ... are ... sold, or otherwise made available to the public." Minn. Stat. Ann. §§ 363.01(18), .03(3) (West 1966 & Supp. 1983). The Minnesota Supreme Court determined that the Jaycees organization is a business "in that it sells goods and extends privileges in exchange for annual membership dues"; that it is a public business in that it "solicits and recruits dues paying members but is unselective in admitting them"; and that it is a public business facility "in that it continuously recruits and sells memberships at sites within the State of Minnesota." United States Jaycees v. McClure, 305 N.W.2d 764, 768 (Minn. 1981). In its decision the Minnesota Supreme Court focused on the panoply of

training programs offered by the Jaycees to its members in order to enhance the members' professional prospects and on the organization's aggressive, non-selective recruitment practices.

The Minnesota Human Rights Act, as applied by the State's highest court to the Jaycees, readily passes muster under the criteria for evaluating vagueness formulated by this Court. As announced in Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) those criteria are:

First ... laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. (Footnotes omitted)

By imposing a notice requirement, the vagueness doctrine allows the public to distinguish between acts that are permissible and those that are not. Here, the Jaycees cannot claim failure to warn.

As construed by the district court, the order of the Minnesota Department of Human Rights is one of prospective reach only. "The purpose of the order was to require the Jaycees to do business in compliance with Minnesota law, if at all." 534 F. Supp. at 772. Accord 709 F.2d at 1580 n.4 (Lay, C.J., dissenting). The Jaycees has been told in precise and explicit detail how in the future it must conduct itself in Minnesota in order to comply with state law.

As to the second element of the vagueness doctrine, the carefully reasoned opinion of the Minnesota Supreme Court convincingly demonstrates that the court has not arbitrarily brought the Jaycees within the scope of the Minnesota Human Rights Act. Rather the court has rendered an interpretation of the statute consistent with the intent of the statutory framers and within the mainstream of Minnesota civil rights law. Given the court's detailed discussion of the Jaycees' aggressive recruitment practices, the non-selectivity of its membership criteria, and the organiza-

tion's business-like orientation towards its membership and the services offered to them, the court's decision is anything but "vague and standardless." Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966).

Of course there may be lingering uncertainties concerning the future application of the statute to other groups. This court has repeatedly stated, however, that marginal imprecision does not render a statute defective. See Coates v. City of Cincinnati, 402 U.S. 611, 613-14 (1971). "Many statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.' " Rose v. Locke, 423 U.S. 48, 49-50 (1975), citing Robinson v. United States, 324 U.S. 282, 286 (1945). See also Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 578-79 (1973) ("there are limitations in the English language with respect to being both specific and manageably brief"). The Eighth Circuit has itself upheld the retrospective application of a criminal statute, even while conceding that the statute's "application to every

future situation is not clear on the face of the words." Knutson v. Brewer, 619 F.2d 747, 750 (8th Cir. 1980). The Eighth Circuit remarked that this infirmity was "true of all, or at any rate of most, criminal statutes." Id.

The application of the Minnesota Human Rights Act does not collide with the Jaycees' exercise of any First Amendment rights, so that the statute and its application need not be subjected to an especially rigorous vagueness test. See Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982). On the contrary, this Court has concurred in the perception that "[i]n applying the rule against vagueness . . . something . . . should depend on the moral quality of the conduct." Bouie v. City of Columbia, 378 U.S. 347, 362 n.9 (1964), quoting Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 540 (1951). Since the Jaycees' discrimination against women is devoid of any positive moral content, the state statute at issue should be construed with great deference. Moreover, because

the statute as applied threatens no First Amendment right, the Jaycees does not have standing to raise the possible vagueness of the statute as it might be applied to other groups. See Hoffman Estates v. Flipside Hoffman Estates, 455 U.S. at 495 n.7.

In its vagueness attack, the Eighth Circuit has focused on a single off-handed dictum in the state court opinion purporting to distinguish the Jaycees and another organization that was not before the Court. Without explanation, the Minnesota Supreme Court stated that the Jaycees was not "analogous[] to private organizations such as Kiwanis International Organization." United States Jaycees v. McClure, 305 N.W.2d 764, 771 (Minn. 1981). On this basis alone, the Eighth Circuit has found the application of the Minnesota public accommodation statute to the Jaycees fatally vague.

The answer to this challenge has been adequately presented by the district court. "There is

insufficient evidence in the record pertaining to the activities of [the Kiwanis Organization and other] groups to allow any determination whether the statute would apply to them and whether the groups engage in protected First Admendment activity. The record as to the Jaycees is, however, well developed." 534 F. Supp. at 773. The Eighth Circuit, without the benefit of a lower court record, has erroneously attempted to draw a profile of the Kiwanis Club and compare it with the record developed for the Jaycees. 709 F.2d at 757-78. A determination of whether the Kiwanis Club is in violation of the Minnesota Human Rights Act cannot be accomplished in this manner. As to the Jaycees, however, the Minnesota court has given a clear and unequivocal ruling based on a comprehensive record. There being no vagueness infirmity in the state court's ruling, the decision of the court of appeals should be reversed.

CONCLUSION

For these reasons, the Court should reverse
the decision of the Court of Appeals.

Respectfully submitted,

Marsha Levick
Judith I. Avner
Lynn Hecht Schafran,
Counsel of Record
NOW Legal Defense and
Education Fund
132 West 43rd Street
New York, New York 10036
(212) 354-1225

Charlotte M. Fischman
Scott D. Heller
Abbe L. Dienstag
Kramer, Levin, Nessen,
Kamin & Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for Amici Curiae*

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acknowledge the assistance of Lisa Davis in the
preparation of this brief.

APPENDIX

Statements of Interest

NATIONAL ORGANIZATION FOR WOMEN

("NOW") is a national membership organization of 200,000 women and men in over 750 chapters throughout the country dedicated to assuring equal economic, social and political opportunity for all women. Since its founding in 1967, NOW has been the largest feminist membership organization dedicated to combatting sex discrimination and removing barriers to women's full participation in all aspects of American society. The Minnesota Chapter of NOW participated as amicus curiae in this case before the Minnesota Supreme Court and in the Eighth Circuit. NOW recognizes the importance of equal access for women to organizations like the U.S. Jaycees which provide leadership development and management skills and facilitate entry into a network of influential business and community leaders.

AMERICAN JEWISH COMMITTEE ("AJC")

is a national organization of approximately 50,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. AJC believes this goal can best be accomplished by helping to preserve and promote the constitutional rights of all Americans. Specifically, AJC supports equal rights under the law for women and is committed to the elimination of gender-based discrimination.

CENTER FOR CONSTITUTIONAL RIGHTS

("CCR") was born of the civil rights movement in the South. CCR attorneys have been active in many of the struggles for equality waged by different groups in our society. CCR attorneys have been involved in cases dealing with employment discrimination, reproductive rights, voting rights and fair housing. Through litigation and public education, CCR has worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

COALITION OF LABOR UNION WOMEN

("CLUW") is a membership organization of labor union women who are interested in improving working conditions and eradicating sex discrimination in all aspects of employment and employment related advancement. CLUW believes that organized and unorganized women are entitled to full participation in all facets of business and civic life.

CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND ("CWEALF") is a non-profit public interest law firm specializing in cases of sex discrimination. Since its inception in 1975, CWEALF has represented women in numerous cases, including women seeking equal access to organizations with discriminatory membership policies. CWEALF has also been active in educating women about their legal rights.

EQUAL RIGHTS ADVOCATES, INC. is a San Francisco based, public interest legal and educational corporation specializing in the area of sex discrimination. It has a long history of interest,

activism and advocacy in all areas of the law which affect equality between the sexes. Equal Rights Advocates, Inc. has been particularly concerned with gender equality in career development because economic equality is fundamental to women's ability to achieve equality in other aspects of society.

NATIONAL CONFERENCE OF BLACK LAWYERS ("N.C.B.L.") is a membership organization of lawyers, scholars, legal workers, law students and other legal activists in the United States, Canada, and the Caribbean, which has had a long-standing commitment to the struggle against sexism. One of its primary goals is to promote and protect the rights of Black women and all minorities in all spheres of their lives. N.C.B.L. believes that discriminatory membership policies of community and business organizations hinder the attempts of all women to achieve full equality in this society.

NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS is an organization of women's bar associations located in 40 states. Membership in these associations includes more than 70,000 women lawyers who share a dedication to the advancement of women in law and in the society as a whole. Equal access to organizations such as the United States Jaycees is vital for women's advancement in the business and professional world; such organizations provide members with the skills, contacts and support needed for success. By withholding membership from women professionals, such organizations restrict the opportunities available to the members of the **NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS** to succeed in their chosen occupation.

NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC. ("B.P.W./U.S.A.") promotes full participation, equity, and economic self-sufficiency for working women. Founded in 1919, B.P.W./U.S.A. represents over 150,000

women and men in 3500 organizations, with at least one local organization in every Congressional district in the United States.

NORTHWEST WOMEN'S LAW CENTER ("Law Center") is a non-profit, membership-supported organization based in Seattle, Washington, that seeks to promote the rights of women through law. The Law Center conducts educational and informational referral programs to advise women in the Pacific Northwest of their legal rights. It also sponsors litigation working towards the total elimination of sex discrimination, including the eradication of employment discrimination and of social and legal barriers that deny women full participation in the business and professional world. The Law Center has filed briefs amicus curiae before this Court and before the United States Court of Appeals for the Ninth Circuit, and has participated as counsel and as amicus curiae before state trial and appellate courts.

WOMEN EMPLOYED is a Chicago-based organization with a membership of 3,000 women workers. Over the past nine years, the organization has assisted working women with problems of sex discrimination. **WOMEN EMPLOYED** also monitors the enforcement, actions and policies of the EEOC and Office of Federal Contract Compliance Programs with regard to a broad range of sex discrimination issues.

WOMEN'S ACTION ALLIANCE, INC., a national non-profit organization, works towards full equality for women by developing educational programs and services that assist women and women's organizations. The issues at stake in this case are critical to that equality which is denied whenever women are barred from full participation in institutions crucial to their development.

WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK ("WBASNY") is a membership organization of approximately 2,000 female and male

attorneys, law graduates and law students committed to the advancement of women's rights. WBASNY cooperates with and aids and supports organizations and causes which advance the status and progress of women in society. Full access by women to decision making positions is one of its primary goals.

WOMEN'S EQUITY ACTION LEAGUE ("WEAL") is a national non-profit membership organization specializing in economic issues affecting women and sponsors research, education projects, litigation and legislative advocacy. WEAL is committed to the full and effective enforcement of anti-discrimination laws at both the federal and state levels, to assure that all economic opportunities are available to women as well as men.

WOMEN'S LAW PROJECT ("WLP") is a non-profit feminist law firm dedicated to eliminating sex discrimination through litigation and public education. Since its founding in 1973, WLP has been concerned with

institutional barriers to the advancement of women at all levels of participation in society. WLP has represented women seeking admission to all male educational institutions and community organizations, and strongly believes that participation in such organizations is fundamental to the ability of women to compete equally in business and community life.

WOMEN'S LEGAL DEFENSE FUND ("WLDF") is a non-profit, tax-exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, and public education. WLDF's experience and knowledge — gained from its members who, as professionals, are disadvantaged by discriminatory membership policies and from its clients who are similarly disadvantaged by

exclusion from community and business organizations — have demonstrated that such exclusionary policies result in a diminution of employment opportunities.

WOMEN U.S.A. is an organization interested in the grass roots concerns of promoting women's need to participate in the economic, social and cultural life of America. It expresses its concern wherever women are prevented from realizing their goal of full equality. Exclusion from full participation in organizations like the Jaycees is discrimination which prevents women from achieving this goal.

MAR 26 1984

ALEXANDER L. STEVAS.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KATHRYN R. ROBERTS, Acting Commissioner, Minnesota
Department of Human Rights; **HUBERT H. HUMPHREY**,
III, Attorney General of the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner of the State of
Minnesota,

Appellants,

VS.

THE UNITED STATES JAYCEES, a non-profit Missouri
corporation, on behalf of itself and its qualified members,

Appellee.

On Appeal from the United States Court of Appeals
for the Eighth Circuit

**AMICUS CURIAE BRIEF OF
ROTARY INTERNATIONAL**

WILLIAM P. SUTTER
Counsel of Record
PETER F. LOVATO, III
DENNIS R. WENDTE
Hopkins & Sutter
Three First National Plaza
Chicago, Illinois 60602
(312) 558-6616

WM. JOHN KENNEDY
Darling, Hall & Rae
400 Pacific Mutual Building
523 West Sixth Street
Los Angeles, California 90014-1068
(213) 627-8104

Counsel for Amicus

TABLE OF CONTENTS

	PAGE
Table Of Authorities	ii
Introductory Statement	1
Interest Of Amicus Curiae	2
The Heart Of The Case	5
Argument	6
I. Freedom Of Association Is Protected By The First Amendment	6
II. The Fourteenth Amendment Prohibits State Action Of A Discriminatory Character; The Fourteenth Amendment Does Not Restrict the First Amendment Right Of Free Association. .	8
III. Thirteenth Amendment Cases And The "Pri- vate Club" Exemption Under The Civil Rights Act Are Irrelevant	10
IV. Organizations Such As The Jaycees And Rotary Have Associational Rights Which Must Be As Constitutionally Protected As Those Of The NAACP	14
V. Minnesota Has Shown No Compelling State Interest In Requiring Admission Of Women Into The Jaycees, And The Statute It Invokes Is Both Vague And Overbroad	21
Conclusion	25
Appendices	A-1
Statement of Decision in <i>Rotary Club of Duarte v. Board of Directors of Rotary International, No. C 244,253</i> , by Superior Court of the State of California for the County of Los Angeles	Appendix A

TABLE OF AUTHORITIES

Federal Cases

<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209 (1977)	7
<i>Bates v. City of Little Rock</i> , 361 U.S. 516 (1960)	14
<i>Bell v. Maryland</i> , 378 U.S. 226 (1964)	16, 17
<i>The Civil Rights Cases</i> , 109 U.S. 3 (1883)	8
<i>Cornelius v. Benevolent Protective Order of the Elks</i> , 382 F. Supp. 1182 (D. Conn. 1974)	13
<i>Daniel v. Paul</i> , 395 U.S. 298 (1969)	12, 13, 17
<i>De Jonge v. Oregon</i> , 299 U.S. 353 (1937)	23
<i>Evans v. Newton</i> , 382 U.S. 296 (1966)	9
<i>Gilmore v. City of Montgomery, Alabama</i> , 417 U.S. 556 (1974)	7, 9, 19, 26
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	16
<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 409 (1968)	11, 12
<i>Knights of the KKK v. East Baton Rouge Parish School Board</i> , 578 F.2d 1122 (5th Cir. 1978)	20
<i>Kusper v. Pontikes</i> , 414 U.S. 51 (1973)	23
<i>Louisiana ex rel. Gremillion v. NAACP</i> , 366 U.S. 293 (1961)	14
<i>Moose Lodge No. 107 v. Irvis</i> , 407 U.S. 163 (1972) ...	6, 9, 13, 26
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958)	6, 14, 15, 16
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	8, 14, 20, 24, 25
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973)	10, 11, 19
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980)	7
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	10, 12

	PAGE
<i>Schneider v. Smith</i> , 390 U.S. 17 (1968)	20
<i>Solomon v. Miami Woman's Club</i> , 359 F. Supp. 41 (S.D. Fla. 1973)	13
<i>Sullivan v. Little Hunting Park, Inc.</i> , 396 U.S. 229 (1969)	12, 13
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945)	15, 21
<i>Tillman v. Wheaton-Haven Recreation Association</i> , 410 U.S. 431 (1973)	9, 13
<i>United Mine Workers of America, District 12 v. Illinois State Bar Association</i> , 389 U.S. 217 (1967)	15, 22
<i>United States Jaycees v. McClure</i> , 709 F.2d 1560 (8th Cir. 1983)	17, 25
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)	16
<i>Wright v. Cork Club</i> , 315 F. Supp. 1143 (S.D. Tex. 1970)	17

State Cases

<i>Curran v. Mount Diablo Council of the Boy Scouts of America</i> , 147 Cal. App. 3d 712, 195 Cal Rptr. 325 (1983), <i>petition for hearing denied</i> , 4 Adv. Cal. 3d 29 (Jan. 6, 1984), <i>appeal pending</i> , No. 83-1513 (filed March 14, 1984)	3
<i>Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis International</i> , 374 N.Y.S.2d 265 (1975), <i>aff'd</i> , 383 N.Y.S.2d 383 (1976), <i>aff'd</i> , 41 N.Y.2d 1034 (1977), <i>cert. denied</i> , 434 U.S. 859 (1977)	13
<i>Rotary Club of Duarte v. Board of Directors of Rotary International</i> , 2d Civ. No. B 001663, Cal. Ct. App., Second App. Dist., Div. Three	2, 21
<i>Village of Skokie v. National Socialist Party of America</i> , 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), <i>aff'd in part and rev'd in part</i> , 69 Ill. 2d 605, 373 N.E.2d 21 (1978)	20

United States Constitution

First Amendment	<i>passim</i>
Thirteenth Amendment	10, 11, 12, 13, 14, 19
Fourteenth Amendment	5, 8, 11

Federal Statutes

42 U.S.C. § 1981	13
42 U.S.C. § 1982	12, 13, 14
42 U.S.A. § 2000a	13
42 U.S.C. § 2000a(e)	13, 14

State Statutes

Minnesota Human Rights Act, Minn. Stat., ch. 363 (1982)	2, 17, 21, 24 25
Unruh Civil Rights Act, Cal. Civ. Code § 51	2

Other Authorities

Webster's Collegiate Dictionary (7th Ed.)	19
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No. 83-724

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KATHRYN R. ROBERTS, Acting Commissioner, Minnesota
Department of Human Rights; HUBERT H. HUMPHREY,
III, Attorney General of the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner of the State of
Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit Missouri
corporation, on behalf of itself and its qualified members,

Appellee.

On Appeal from the United States Court of Appeals
for the Eighth Circuit

AMICUS CURIAE BRIEF OF ROTARY INTERNATIONAL

INTRODUCTORY STATEMENT

This brief is submitted by Rotary International as *amicus curiae* in support of the appellee in the above-captioned case. Written consents of appellants and appellee are on file with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* Rotary International ("Rotary") arises from the fact that the Board of Directors of Rotary and Rotary District 530 are defendants and respondents in *Rotary Club of Duarte v. Board of Directors of Rotary International*, 2d Civ. No. B 001663, pending in the Court of Appeal of the State of California, Second Appellate District, Division Three. That case seeks an injunction preventing the defendants from enforcing Rotary's bylaws that restrict membership to males. The action was brought under a California statute (the Unruh Civil Rights Act, Cal. Civ. Code § 51) which is highly similar to the Minnesota statute involved in the instant case. The Unruh Civil Rights Act provides, in part, as follows:

All persons within the jurisdiction of this state . . . no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

The trial court concluded that Rotary was not subject to the statute because the term "business establishment" does not extend to private membership organizations such as Rotary.¹ However, appellants assert in the appellate court that the statute does not apply to such organizations:

Nor does the fact that International's clubs are personal associations create an exemption from the Unruh Act. [Appellant's Opening Brief, Court of Appeal, p. 6]

This construction of the California statute, if adopted, would be comparable to the construction of the Minnesota statute as applied to the Jaycees in the instant case, and

¹ The full text of the trial court's Statement of Decision is set forth in the Appendix to this brief.

would present the same constitutional issues.² Rotary believes that those issues should be resolved in the Jaycees' favor, and that it may be helpful to the Court if such issues are also considered in the context of the facts developed in the *Rotary Club of Duarte* case and official Rotary publications.

Rotary is a worldwide association of approximately 20,500 local Rotary Clubs in approximately 158 countries. Membership in the local clubs is restricted to business and professional men. An individual Rotarian is a member of a local club; all local clubs are members of Rotary International. While Rotary does not discriminate on the basis of race, religion or national origin, membership is by invitation only, and is based on choosing one male representative of each classification of business, profession, and institution in the community. This "classification principle," as it is known in Rotary, is intended to prevent the predominance in a club of any one group.

Regular attendance at weekly meetings is one of the conditions of club membership and average world-wide attendance at such meetings is 80%. Where conflicts prevent a Rotarian from attending his own club's meeting, he is required to make up his attendance at the regular meeting of another club. Rotarians are specifically requested not to use the privilege of membership for commercial purposes.

² Since the trial court decision in favor of Rotary, the California Court of Appeal has decided *Curran v. Mount Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *petition for hearing denied*, 4 Adv. Cal. 3d 29 (Jan. 6, 1984). *Curran* imposes a wide ranging and searching program of judicial supervision upon membership organizations which is far more intrusive than the Minnesota statute and seriously threatens Rotary's trial court victory. The Boy Scouts have filed a jurisdictional statement (No. 83-1513) with this Court seeking constitutional review akin to that at issue here.

Any use of the fellowship of Rotary as a means of gaining an advantage or profit has been declared by its Board of Directors to be foreign to the spirit of Rotary.

While there is no uniform set of rules for admission of new members which must be adopted by a local Rotary Club, the rules adopted must not be out of harmony with the Standard Rotary Club Constitution and the bylaws of Rotary International. The Board of Directors of Rotary has adopted Recommended Club Bylaws for local clubs, and the procedures described hereinafter are those set out in such bylaws.

The name of a candidate for admission must be proposed to the local club by the membership committee or by an active, senior active, or past service member. The sponsor submits the man's name to the club's board of directors on a membership proposal card. The board sends the card to the classifications committee and the membership committee. The former makes sure that there is an open classification of business or profession and that the prospective member's business or profession is accurately described by that classification. The latter evaluates the candidate from the standpoint of character, business and social standing, and general eligibility. To avoid embarrassment, the candidate's name is kept confidential throughout this preliminary procedure and the candidate himself is not told of these investigations.

If the reports of both committees are favorable and the board approves them, the proposer and a member of the information committee contact the man and ask whether he is willing to become a member and, if so, whether he is willing to have his application published to the members. Assuming that he is, his name, business and classification are published to the members. If there is no written objection received by the board within 10 days, the candidate

becomes a member. If there is such an objection, membership requires a further approving vote by the board. To be an active member, a man must work in a leadership capacity (owner, partner, manager, *et al.*) in the business or profession in which he is classified.

The motto of Rotary is "Service Above Self," and its Object, which is set forth in its Constitution and in the Standard Club Constitution, is the application of the Ideal of Service.

In addition to Service, fellowship is a prime motivating force in Rotary. Each club has a fellowship committee and special events are frequently planned. Rotary publishes a song book, *Sing, Rotarians, Sing*, which is popular in many English-speaking clubs. In Japan, banquets are planned for cherry blossom viewing and harvest moon viewing. While fellowship is pursued in different ways by different clubs, Rotarians subscribe to the words of Founder Paul Harris, who wrote: "Fellowship is wonderful; it illuminates life's pathway, spreads good cheer, and is worth a high price."

Rotary's all-male membership policy is believed by its members to enhance its fellowship and to enable it to operate more effectively over a worldwide base of varied cultures and social mores. Proposals to change this policy have consistently been voted down by Rotary's international legislative body.

THE HEART OF THE CASE

Freedom of association is protected by the First Amendment. While Fourteenth Amendment guarantees of equal protection prohibit state action of a discriminatory character, the Fourteenth Amendment does not apply to private action, and it is wrong to extrapolate from the pro-

hibition against state action the existence of a power in the state to abrogate the precious rights which the First Amendment protects, except upon a showing of compelling state interest. Organizations such as Rotary and the Jaycees are no less entitled to protection of their associational rights than is the NAACP.

ARGUMENT

I. Freedom Of Association Is Protected By The First Amendment

It has been clear, at least since the landmark decision of *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), that the freedom to select one's associates is a right which, although not expressly mentioned in the First Amendment, is cognate to those rights therein enumerated, and entitled to equal protection.

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. [357 U.S. at 460-461]

This principle was perhaps best stated by Justice Douglas in his famous dissenting opinion in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972):

The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish or all agnostic clubs to be established. *Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.* [407 U.S. at 179-180; emphasis supplied]

These words were quoted with approval by Justice Blackmun in *Gilmore v. City of Montgomery, Alabama*, 417 U.S. 556 (1974), where, speaking for the Court, he struck down a lower court order prohibiting use of a public park by discriminatory private groups. Justice Blackmun continued:

The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversification of opinion that oils the machinery of democratic government and insures peaceful, orderly change. [417 U.S. at 575]

In *Aboud v. Detroit Board of Education*, 431 U.S. 209 (1977), Justice Stewart, speaking for the Court, said:

Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. . . .

. . .

. . . For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. [431 U.S. at 233, 234-235]

Again, hear the words of Chief Justice Burger, in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980):

Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights.

Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined. [448 U.S. at 579-580]

Finally, in *NAACP v. Button*, 371 U.S. 415 (1963), Justice Brennan agreed that "there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus, we have affirmed the right 'to engage in association for the advancement of beliefs and ideas.'" *Id.* at 430. Justice Brennan continued:

The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner. See, e.g., *Near v. Minnesota*, 283 U.S. 697; *Terminiello v. Chicago*, 337 U.S. 1; *Kunz v. New York*, 340 U.S. 290. For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered. [371 U.S. at 444-445]

Let us take as a first premise, then, that freedom of association is a basic constitutionally protected right.

II. The Fourteenth Amendment Prohibits State Action Of A Discriminatory Character; The Fourteenth Amendment Does Not Restrict The First Amendment Right Of Free Association

Over 100 years ago, in *The Civil Rights Cases*, 109 U.S. 3 (1883), it was established that the Equal Protection Clause of the Fourteenth Amendment does not prohibit the "(i)ndividual invasion of individual rights." *Id.* at 11.

This principle has been reiterated in *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973), and *Gilmore v. City of Montgomery, Alabama*, 417 U.S. 556 (1974). Justice Rehnquist, speaking for the Court in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), noted:

In 1883, this Court in *The Civil Rights Cases*, 109 U.S. 3, set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, "however discriminatory or wrongful," against which that clause "erects no shield," *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). That dichotomy has been subsequently reaffirmed in *Shelley v. Kraemer*, *supra*, and in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). [407 U.S. at 172]

Justice Douglas had earlier dealt with this same dichotomy and the necessity of differentiating between state action and private action. In *Evans v. Newton*, 382 U.S. 296 (1966), he wrote:

There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality, which of course bars a city from acting as trustee under a private will that serves the racial segregation cause. . . . A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association. But a municipal course that serves only one race is state activity indicating a preference on a matter as to which the State must be neutral. [382 U.S. at 298-299]

After holding a park to be in the public sector, even though it was nominally controlled by private trustees, Justice Douglas continued:

The service rendered even by a private park of this character is municipal in nature. It is open to every

white person, there being no selective element other than race. Golf clubs, social centers, luncheon clubs, schools such as Tuskegee was at least in origin, and other like organizations in the private sector are often racially oriented. A park, on the other hand, is more like a fire department or police department that traditionally serves the community. [382 U.S. at 301-302]

Thus, a second premise may be taken to be that the freedom of association protected by the First Amendment includes the right to discriminate or exclude from one's associates any person or class of persons, so long as state action is not involved.

III. Thirteenth Amendment Cases And The "Private Club" Exemption Under The Civil Rights Act Are Irrelevant

Appellants and their *amici* rely heavily upon such cases as *Norwood v. Harrison*, 413 U.S. 455 (1973), and *Runyon v. McCrary*, 427 U.S. 160 (1976), which are irrelevant to the issues presented here. Those cases were decided under the Thirteenth Amendment and upheld federal statutes passed under the authority of that amendment. The instant case involves no federal statute passed to enforce a constitutional provision; to the contrary, this case involves a state law which operates in derogation of the fundamental right to freedom of association which is protected by the First Amendment.

Appellants and their *amici* place great emphasis upon the statement of Chief Justice Burger in *Norwood v. Harrison*, 413 U.S. 455 (1973), to the effect that:

[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association pro-

tected by the First Amendment, but it has never been afforded *affirmative* constitutional protections. [413 U.S. at 469-470; emphasis supplied]

Appellants, however, ignore the fact that the *affirmative* constitutional protection which was sought and denied in *Norwood* was the right to invoke the Equal Protection Clause to require state support in the form of free textbooks for a discriminatory private school. The key holding of the case is:

That the Constitution may *compel* toleration of private discrimination in some circumstances does not mean that it *requires state support* for such discrimination.

... Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State. [413 U.S. at 463, 469; emphasis supplied]

The Jaycees do not seek state support for their organization, but they properly insist that the First Amendment compels toleration of their associational freedom to exclude females from membership.

Furthermore, as previously stated, *Norwood* is a Thirteenth Amendment case and Chief Justice Burger emphasized therein that:

[E]ven some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts. [413 U.S. at 470]

That the Thirteenth Amendment permits Congress to prohibit purely private discrimination against blacks was established in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). That case involved a refusal by a private party to sell a home to a black and the Court held that such dis-

crimination was barred by 42 U.S.C. § 1982. The constitutionality of this statute as applied to private persons was upheld because the Thirteenth Amendment authorizes Congress "to eliminate all racial barriers to the acquisition of real and personal property." 392 U.S. at 439. As Justice Stewart said, speaking for the Court, the promise of freedom which the Thirteenth Amendment gave to black citizens would be "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." *Id.* at 443.

Legislation intended to eliminate the last vestiges of slavery from this great Nation, therefore, may constitutionally impinge upon purely private rights. However, this affords no basis for appellants' position. Justice Stewart, speaking for the Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), explicitly recognized that the consolidated cases there presented:

. . . do not present any question of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. [427 U.S. at 167]

Runyon stands for no more than its holding:

Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under § 2 of the Thirteenth Amendment [427 U.S. at 179]

Appellants and their *amici* also assert that the Jaycees are not a "private club" within the meaning of such cases as *Daniel v. Paul*, 395 U.S. 298 (1969); *Sullivan v. Little*

Hunting Park, Inc. 396 U.S. 229 (1969); and *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973). Rotary believes that if all relevant factors are considered, the Jaycees and its local chapters should be considered to be "private clubs"; further, Rotary insists that it and local Rotary Clubs fall within that category. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Solomon v. Miami Woman's Club*, 359 F. Supp. 41 (S.D. Fla. 1973); *Cornelius v. Benevolent Protective Order of the Elks*, 382 F. Supp. 1182 (D. Conn. 1974); and *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis International*, 374 N.Y.S.2d 265 (1975), *aff'd*, 383 N.Y.S.2d 383 (1976), *aff'd*, 41 N.Y.2d 1034 (1977), *cert. denied*, 434 U.S. 859 (1977). However, the "private club" argument is no more than a red herring. It has no place in consideration of the issues presented here.

As noted above, under the Thirteenth Amendment, Congress is authorized to legislate against racial discrimination and has done so through numerous statutes. Among these are 42 U.S.C. §§ 1981, 1982 and 2000a, *et seq.* Neither § 1981 nor § 1982 contains any exception for private clubs, but such an exception is contained in § 2000a(e). In each of *Daniel v. Paul*, *Sullivan v. Little Hunting Park, Inc.*, and *Tillman v. Wheaton-Haven Recreation Association*, the Court held that the entity involved was not a "private club" within the meaning of § 2000a(e). Further, in *Tillman* the Court expressly noted that because Wheaton-Haven was not a private club, "it is not necessary in this case to consider the issue of any implied limitation on the sweep of § 1982 when its application to a truly private club, within the meaning of § 2000a(e), is under consideration." 410 U.S. at 438-439.

The Thirteenth Amendment reaches private acts of discrimination if Congress chooses to enact legislation pro-

hibiting such acts. In § 2000a(e), Congress exempted "private clubs," but there has been no holding by this Court that it was constitutionally required to do so, nor has this Court yet held that the exemption provided by § 2000a(e) imposes a limitation upon § 1982, which contains no such exemption. It may be that the Thirteenth Amendment permits Congress to proscribe the activities even of private clubs. Where the Thirteenth Amendment cannot be invoked, however, basic First Amendment rights, such as freedom of association, and the protection of those rights from infringement, are not limited to a narrowly defined class which may be termed "private clubs."

IV. Organizations Such As The Jaycees And Rotary Have Associational Rights Which Must Be As Constitutionally Protected As Those Of The NAACP

Appellants and their *amici* argue that the Jaycees are not entitled to First Amendment protections. More particularly, such arguments fall into three broad categories: (1) the commercial objectives of the Jaycees do not qualify as First Amendment activities; (2) only "truly private clubs" having "selective" membership restrictions are entitled to freedom of association protection; and (3) freedom of association is inapplicable to "invidious" discrimination.

The NAACP serves as a useful yardstick for measuring the merit of these arguments since its membership has frequently been accorded freedom of association protection. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *NAACP v. Button*, 371 U.S. 415 (1963). Measured against the NAACP, the Jaycees are equally entitled to claim freedom of association protection.

Like the Jaycees, who seek, among other goals, the economic and business advancement of young men, the NAACP seeks those advantages for a limited segment of the population. Its objectives include "... to advance the interests of colored citizens ... [and] to increase their opportunities for ... employment ..." 357 U.S. at 451 & n.

In holding the NAACP entitled to freedom of association protection, this Court explicitly included the economic objectives of the organization within the protection.

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of "liberty" assured by the Due Process clause of the Fourteenth Amendment Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, *economic*, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. [357 U.S. at 460-461; emphasis supplied]

As long ago as 1945, this Court held that the mere fact that business interests may be involved in an associational group is not sufficient to cause the group to lose the protection of the First Amendment.

The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one "engaged in business activities" [*Thomas v. Collins*, 323 U.S. 516, 531 (1945)]

Similarly, *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967), stands for the proposition that the financial benefit of members of an association is an associational right which cannot be

abridged. See also *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

The NAACP is assuredly not a "private club." Its membership criteria are substantially less selective than those of the Jaycees. Its constitution provides that "any person who is in accordance with its principles and policies . . . may become a member." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958). Membership was shown to be aggressively solicited through an interstate network of regional and local affiliates and the organization was required to register as a business. *Id.* at 451-452. Nevertheless, this Court held that a large organization, broadly open to the public, is entitled to constitutional protection of its freedom of association.

Turning again to Justice Douglas, who has written more opinions in this area than any other Justice, we learn that

The right of "association," like the right of belief . . . is more than the right to attend a meeting; it includes the right to express one's attitude or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful. [Griswold v. Connecticut, 381 U.S. 479, 483 (1965); emphasis supplied]

For First Amendment purposes, the question is not whether a group which asserts associational rights is a "private club," but rather whether genuine associational purposes of the group exist and require constitutional protection. In terms of common understanding, does the group exist to serve the general public as "customers" or a more limited group as "members"? In this connection, see the concurring opinion of Justice Goldberg in *Bell v. Maryland*, 378 U.S. 226 (1964), in which he discusses at length the

development of the law relating to public conveyances and places of public accommodation and concludes that exclusion of blacks from such places is a violation of their constitutional rights. However, it was in precisely that context that Justice Goldberg stated:

Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

We deal here, however, with a claim of equal access to public accommodations. This is not a claim which significantly impinges upon personal associational interests. . . . [378 U.S. at 313]

It is, of course, true that the Minnesota statute, by its terms, applies only to "places of public accommodation," and that the Minnesota Supreme Court has found the Jaycees to be such a place. However, as correctly stated by the Court of Appeals for the Eighth Circuit in this case, this finding alone cannot justify otherwise unconstitutional infringement of freedom of association:

We must decide that issue for ourselves. "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). [*United States Jaycees v. McClure*, 709 F.2d 1560, 1566 (8th Cir. 1983)]

The Jaycees do not exist for the purpose of providing goods and services to the general public. The Jaycees are not a sham organization created to avoid the reach of the Minnesota public accommodations statute while serving the public as customers. *Cf. Daniel v. Paul*, 395 U.S. 298 (1969); *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex.

1970). The Jaycees' bylaws state that the corporation's purpose is to "promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organizations a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendships and understanding among young men of all nations." The Jaycees also have a Creed. Association with the Jaycees is an expression of opinion entitled to First Amendment protection as fully as association with the NAACP.

The Jaycees have embarked on a nation-wide program in support of President Reagan's economic policy and the court may take judicial notice of the fact that it is commonly believed that a substantial difference exists in the President's support by men and women (the so-called "gender gap"). Those who join the Jaycees make a conscious, voluntary choice to associate with other men who share a common purpose. Governance is in the members. The Jaycees thus have an associational *raison d'être* and it is a part of their belief that their associational purposes will be furthered if they do not admit women into regular membership. This belief may or may not be correct; admission to regular membership might or might not provide women with benefits now accruing only to male members. None of this is relevant. What is relevant is that, by compelling the admission of women into membership, the State of Minnesota negates the right of those who believe as the Jaycees do to associate for a common purpose. Another group might be formed with substantially the same goals as the Jaycees, but with the belief that such goals would be best furthered

if blacks were not admitted. Yet another might admit both blacks and women. All of such organizations would be similar; they would not be identical. The State of Minnesota seeks to compel homogeneity which is the antithesis of freedom of association and runs counter to the pluralism which is one of America's strengths.

Finally, appellants and their *amici* assert that "invidious" discrimination is not entitled to First Amendment protection, citing *Norwood v. Harrison*, 413 U.S. 455 (1973). It has already been demonstrated that *Norwood* did not deny constitutional protection to invidious discrimination but merely held that the State cannot constitutionally be compelled to furnish support to such discrimination. In addition, as also pointed out, *Norwood* involved the Thirteenth Amendment, which is inapplicable here. Further, in *Gilmore v. City of Montgomery, Alabama*, 417 U.S. 556 (1974), this Court held that the First Amendment rights of all-white recreational groups could not be abridged by denying them access to a municipal park.

An accepted definition of "invidious" is "tending to cause discontent, animosity, or envy." Webster's Collegiate Dictionary (7th Ed.). The aggressive policies of the NAACP on behalf of blacks have assuredly caused discontent, animosity, and, in the case of affirmative action programs, envy among many white Americans. But the fact that the NAACP restricts its activities to the advancement of the cause of blacks has not caused it to lose its First Amendment rights. Quite the contrary. The unpopularity of its cause has been a major factor perceived by the Court as necessitating protection of such rights. At the present time, male-only organizations such as the Jaycees and Rotary are encountering governmental and social hostility akin to that directed at the NAACP in the 1960's. However, it will not do to assert that because the male versus female

discrimination practiced by such organizations is perceived as wicked, it is undeserving of constitutional protection. The First Amendment is both color-blind, and gender-blind. Freedom of association and the other rights protected by that amendment are protected whether the group invoking the Constitution is perceived as "good" or "bad," "right" or "wrong." Constitutional liberties are guarded regardless of whose ox is being gored.

The course of our decisions in the First Amendment area makes plain that the protection would apply as fully to those who would arouse our society against the objectives of the [NAACP]. [*NAACP v. Button*, 371 U.S. 415, 444 (1963)]

Other organizations having policies of discrimination far more virulent and contrary to public policy than the male-only membership of the Jaycees have enjoyed First Amendment protection as well. *Knights of the KKK v. East Baton Rouge Parish School Board*, 578 F. 2d 1122, 1127-1128 (5th Cir. 1978); *Village of Skokie v. National Socialist Party of America*, 51 Ill. App. 3d 279, 366 N.E. 2d 347 (1977), *aff'd in part and rev'd in part*, 69 Ill. 2d 605, 373 N.E. 2d 21 (1978).

The Jaycees, Rotary, the Boy Scouts and the Kiwanis are all certainly no less entitled to First Amendment protection than the NAACP, the KKK, the American Nazi Party and thousands of other selective membership organizations which may be or be regarded as "invidiously discriminatory." The guiding principle to be kept in mind is that expressed by Justice Douglas in *Schneider v. Smith*, 390 U.S. 17 (1968):

The purpose of the Constitution and Bill of Rights, unlike more recent models promoting a welfare state, was to take government off the backs of people. The First Amendment's ban against Congress "abridging" freedom of speech, the right peaceably to assemble and

to petition, and the "associational freedom" . . . that goes with those rights creates a preserve where the views of the individual are made inviolate. This is the philosophy of Jefferson that "the opinions of man are not the object of civil government, nor under its jurisdiction. . . ." [390 U.S. at 25; emphasis supplied]

If the State of Minnesota is to constitutionally abridge the Jaycees' freedom of association, it must do more than classify the Jaycees as a place of public accommodation. In *Rotary Club of Duarte v. Board of Directors of Rotary International*, 2d Civ. No. B 001663, pending in the Court of Appeal of the State of California, Second Appellate District, Division Three, the Women Lawyers' Association of Los Angeles, in its *amicus* brief in support of plaintiffs, said:

A private group, selective in its memberships and not open to the general public . . . , is still within the Unruh Act if it "has sufficient businesslike attributes to fall within the scope of the Act's reference to 'business establishments of every kind whatsoever'." [Brief, p. 16]

Rotary submits that such proposition is flatly wrong. *Thomas v. Collins*, 323 U.S. 516 (1945). First Amendment rights are too precious to be abridged merely upon a finding that "business" or "public accommodations" are involved. Where true associational freedoms are advanced, as they are in the instant case, only a compelling state interest can justify their curtailment. No such interest has been shown by the State of Minnesota.

V. Minnesota Has Shown No Compelling State Interest In Requiring Admission Of Women Into The Jaycees, And The Statute It Invokes Is Both Vague And Overbroad

The burden which the state must meet when it seeks to abridge First Amendment rights is a heavy one. As expressed in *Thomas v. Collins*, 323 U.S. 516 (1945):

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153.

For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. *The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation.* [323 U.S. at 529-530; emphasis supplied]

In the instant case, the State of Minnesota believes sex discrimination in private associations to be harmful to women, if not to the entire citizenry of the State. Therefore, it asserts the right to proscribe it. But if this were all that were required to abridge First Amendment rights, those rights would indeed be illusory, for any association of which the state did not approve could be legislated out of existence to advance the state's interest in eliminating the disapproved activity.

As Justice Black put it in *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967):

The First Amendment would, however, be a hollow promise if it left government free to destroy or erode

its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). [389 U.S. at 222]

De Jonge v. Oregon, 299 U.S. 353 (1937), involved an attempt to outlaw a peaceable public meeting sponsored by the Communist Party because the Party advocated "criminal syndicalism." Striking down the law involved, this Court said:

The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . .

These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But *the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.* [299 U.S. at 364-365; emphasis supplied]

In *Kusper v. Pontikes*, 414 U.S. 51 (1973), Justice Stewart wrote:

As our past decisions have made clear, *a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. . . .* For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn v. Blumstein*, 405 U.S., at 343. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S., at 438. [414 U.S. at 58-59; emphasis supplied]

The expressed interest of the State of Minnesota in discouraging sex discrimination in private associations does not justify legislation which abolishes all private discriminatory organizations. In his opinion invalidating the Minnesota statute, Judge Arnold discussed a number of ways in which the state could have expressed its displeasure with the Jaycees' male-only policy which would be far less intrusive on the organization's First Amendment rights. This Court need not decide whether any of those ways would be constitutionally supportable. A blanket prohibition of the exercise of a protected First Amendment right is not, however, constitutionally valid under any circumstances.

In addition to the absence of a compelling state interest to justify the statute here in question, the statute also must also fall for vagueness and overbreadth. In *NAACP v. Button*, 371 U.S. 415 (1963), the Virginia Supreme Court attempted to draw a line between those activities which NAACP attorneys could perform for members and those which were prohibited solicitation. In refusing to sustain the constitutionality of the law as thus construed by the state court, Justice Brennan, speaking for this Court, said:

If the line drawn by the decree between the permitted and prohibited activities of the NAACP, its members and lawyers, is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. . . . Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill v. Alabama*, 310 U.S. 88, 97-98; *Winters v. New York*,

supra, at 518-520. Cf. *Staub v. City of Baxley*, 355 U.S. 313. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. *The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.* [371 U.S. at 432-433; emphasis supplied]

The Minnesota Supreme Court has construed the statute in this case as applying to the Jaycees, but not to the Kiwanis. As Judge Arnold points out in his opinion:

The law, as construed by the Minnesota Supreme Court, simply provides no ascertainable standard for inclusion or exclusion, *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971), and is therefore void for vagueness. [709 F.2d at 1578]

CONCLUSION

The Court may take judicial notice that "male chauvinism" is under attack from all sides at present. Defense of men-only organizations is not popular, and even the ACLU, famed for its defense of the rights of the American Nazi Party, has seen fit to join the women in the attack against the Jaycees. The climate of the times may be on the side of "equal rights." But if the precious freedoms protected by the First Amendment may be swept away whenever one of those freedoms is involved in an unpopular cause, then this great land is further down the road to a fictional 1984 than most of its citizens would wish to travel. Quoting again from Justice Brennan in *NAACP v. Button*:

It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. [371 U.S. at 435]

Groucho Marx well expressed the basic human desire to select one's own associates when he said he would not wish to belong to any club that would admit someone like him. Unfortunately, to the person excluded, admission frequently appears to offer far greener grass than is available outside—and, indeed, perhaps in some instances it does. But as Justice Douglas has so lucidly stated, the Constitution and the Bill of Rights exist to get government off the backs of the people. "Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 180 (1972); *Gilmore v. City of Montgomery, Alabama*, 417 U.S. 556, 575 (1974).

For the above-stated reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM P. SUTTER

Counsel of Record

PETER F. LOVATO, III

DENNIS R. WENDTE

Hopkins & Sutter

Three First National Plaza

Chicago, Illinois 60602

(312) 558-6616

WM. JOHN KENNEDY

Darling, Hall & Rae

400 Pacific Mutual Building

523 West Sixth Street

Los Angeles, California 90014-1068

(213) 627-8104

Counsel for Amicus

APPENDIX

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ROTARY CLUB OF DUARTE, MARY
LOU ELLIOTT and ROSEMARY
FREITAG,

Plaintiffs,

v.

BOARD OF DIRECTORS OF
ROTARY INTERNATIONAL,
ROTARY DISTRICT 530, PAUL G.
BRYAN, and OLIVER BATCHELLOR,

Defendants.

NO. C 244, 253

STATEMENT
OF DECISION

(C.C.P. § 632)

The above-entitled case came on regularly for trial on December 2, 1982 in Department 54 of the above-entitled Court, the Honorable Max F. Deutz, Judge presiding, without a jury. Trial was concluded on December 3, 1982. Sanford K. Smith, Esquire, Carol Agate, Esquire, and Fred Okrand, Esquire of the American Civil Liberties Union Foundation of Southern California appeared as counsel for plaintiffs. Wm. John Kennedy, Esquire and Darling, Hall & Rae appeared as counsel for defendants.

A "Stipulation Regarding Certain Undisputed Facts and Related Portions of the Record" together with the documentary material specified therein was received by the Court. Additional oral and documentary evidence was introduced on behalf of the respective parties. Both sides submitted initial and supplemental trial briefs. The case was orally argued and submitted for decision on January 28,

1983. The Court issued a written Memorandum of Decision on February 8, 1983. The Court now, at the request of all parties, issues this Statement of Decision in accordance with California Code of Civil Procedure § 632.

The Court has determined that the following facts are true.

Rotary International is a worldwide association of approximately 20,000 local Rotary clubs in approximately 157 different countries. Membership in the local clubs includes approximately 1,000,000 business and professional men worldwide. Rotary International is an Illinois not-for-profit corporation having its principal office in Evanston, Illinois. It has not qualified to do business in California and has received no tax exemptions from the State of California.

Each local Rotary Club seeks its members from the business and professional leaders within a clearly-defined geographical community approximating a single municipality in size. There is only one local Rotary Club in any given geographical community. For purposes of administration, Rotary International groups geographically adjacent clubs into districts. The clubs in each district annually nominate a district governor who, after being elected by Rotary's annual international convention, serves as the field representative of Rotary International.

Plaintiff Rotary Club of Duarte ("Duarte") was a local Rotary club prior to its expulsion within Rotary District 530. Former District 530 governors Paul Bryan and Oliver Batchellor have been voluntarily dismissed as defendants.

The primary purpose of Rotary is to encourage a fellowship among business and professional men representing a diverse cross-section of the business and professional activities within the local community. In addition to the encouragement of fellowship for its own intrinsic merit,

Rotary uses that fellowship to promote a variety of voluntary, civic, eleemosynary, and charitable "service" activities undertaken by the local clubs with the guidance and assistance of Rotary International. Additional assemblies, "service" projects, and other activities of broader geographical scope are also undertaken at the district, national and international level.

Although some individual Rotarians derive sufficient business advantage from Rotary to warrant deduction of Rotarian expenses in income tax calculations, or to warrant payment of those expenses by their employers, the Court finds that such business benefits are incidental to the principal purposes of the association which are to promote fellowship for *non-commercial*, and *non-economic* objectives and to secure the voluntary uncompensated participation of business and professional men in the aforesaid "service" activities. For many years the official and genuine policy of Rotary International has been to discourage the seeking or giving of preferential business custom among Rotarians or the use of Rotarian membership for commercial gain. Although Rotary on occasion sponsors vocational seminars for its members addressed to the general business interests of its membership, the Court finds such activity to be of subordinate importance to the aforesaid principal purposes of Rotary, and to be consistent with the purpose of encouraging disinterested fellowship among Rotarians.

The importance of associational congeniality among Rotarians is substantial. Demanding and strictly enforced standards for attendance at weekly meetings result in an average worldwide attendance of 80 percent. When conflicts prevent a Rotarian from attending his own club's meeting, he is required to "make-up" his attendance at the regular meeting of another club. Such "make-up" activities result

in substantial inter-club attendance. International travel results in a material amount of club visitation by foreign Rotarians. Attendance at weekly meetings is in addition to participation in the voluntary cooperative "service" projects which form a central part of Rotarian activity.

Rotary does not discriminate on the grounds of race, religion, or national origin and welcomes local clubs having memberships that are representative of the diverse origins of their local population. The plaintiff Duarte club had for many years prior to its expulsion been such a racially, religiously, and ethnically diverse club. However, in a number of other respects Rotary is highly selective in its membership.

In order to provide a diversity of fellowship, to prevent clubs from being dominated by a few business or professional segments of the community, and to encourage a broad awareness of community needs to be addressed by the "service" activities, Rotary imposes a "classification" system limiting the number of members in a local club from any single line of business or profession. Although this "classification" system appears to have originated many years ago from self-seeking commercial purposes, the Court finds that Rotary has for many years consciously, genuinely, and effectively abandoned use of the "classification" system as a device for encouraging preferential business relationships among Rotarians.

In addition to the "classification" system, local Rotary clubs, prompted by advice from Rotary International, screen potential members for the integrity of their reputation in the business community, for their dedication to the "service" objectives of Rotary, and for their willingness and ability to abide by the rigorous attendance and participation standards of Rotary. Rotary membership is neither solicited from nor is it available to the public generally.

At the club membership level Rotary International, with the cooperation of the district governor, carefully screens new clubs to see that the community in which they propose to function is not already served by a local Rotary club, that the proposed new community contains a minimum of 50 separate "classifications", and that a minimum of 20 qualified business and professional men in 20 separate "classifications" are willing and available to start the new club. Each new club is then placed on a probationary basis to make certain it can effectively discharge its attendance, service and other Rotarian obligations.

A principal task of the district governor is to make an annual visit to and review of the local clubs in his district to see that they are remaining active, complying with the applicable Rotarian rules, and rendering effective "service" to their communities. Annual reports to Rotary International on each local club give a detailed review of membership level, attendance level, and a description of the "service" activities of the club. Laggard clubs are given special attention both by the district governor and Rotary International. If a local club persists in an unsatisfactory level of membership, attendance, or community service, efforts are made to secure the voluntary termination of its charter. In a few extreme cases, involuntary termination of a local club's charter has been necessary.

In addition to the foregoing principles of selectivity the constitution of Rotary International imposes on local Rotary clubs a membership restricted to "adult male persons". The rule had its origin many years ago in the quality of fellowship desired by Rotary's founders. However, as Rotary grew nationally and internationally, that membership policy grew into a fundamental and broadly accepted principle of Rotarian operation, cherished not only for the

quality of fellowship which it provided, but also to a material extent maintained because of the demonstrated fact that, as a "male-only" organization, Rotary had been able to operate effectively over a worldwide base of varied cultures and social mores.

In the last decade a number of proposals have been made to modify the restriction to allow more participation by women. In recent years, the only body authorized to amend Rotary International's constitution is the 400-man Council on Legislation which meets once every three years and is composed of democratically elected representatives from all of the diverse countries having local Rotary clubs. A vote of two-thirds of the delegates is required to approve an amendment. At both the 1977 meeting of the Council on Legislation in San Francisco, and at the 1980 Council on Legislation in Chicago several proposals to amend the "male-only" policy were debated and rejected. In 1980, 60 percent of the delegates voted against amending the membership restriction. The issue remains alive and vital and will be again debated at the 1983 Council on Legislation in Monaco.

It is clear that a ruling by this court, applying California law to California chapters of Rotary, allowing them to accept woman members contrary to the long standing and democratically reaffirmed membership principles of Rotary would comprise a material interference with deeply felt choices of associational preference of many Rotarians. The practical impact of such a ruling would materially affect the operation of Rotary not merely outside the State of California but outside the United States.

The Court accepts the testimony herein of Rotary's General Secretary that this issue is of widespread and deep concern among Rotarians both in the United States and in

widely different cultures throughout the world. The Court also accepts his testimony that the continued successful worldwide operation of Rotary is materially dependent on a delicate balance of divergent attitudes in diverse cultures, and that judicial interference with this balance, as reflected by the votes in Rotary's Council on Legislation, would risk a material and harmful disruption of the existing cooperative integrity of Rotary International both inside and outside the State of California.

Plaintiffs do not *directly* challenge the accuracy or merit of Rotary's concerns about the impact of interfering with its membership policy. Rather, they assert that there are countervailing economic interests of women in having access to Rotarians *within the ambit of Rotarian fellowship* for the purpose of acquiring "business contacts" which, they claim, cannot be achieved outside the limited confines of that fellowship. Ironically, this contention would have the Court nullify existing membership restrictions so that women could further violate Rotarian precepts by seeking commercial exploitation of Rotarian membership.

The Court finds that plaintiffs have not demonstrated that membership in the Duarte Club prior to its expulsion from Rotary comprised a substantial source of business contacts. In fact, Duarte was having difficulty attracting members. The Court further finds that the expulsion of Duarte from Rotary did not harm it as a vehicle for making business contacts. In fact the size of its membership and the vigor of its activities thereafter increased. The three female members of Duarte, *by their own admission*, did not join Duarte for professional benefits and disclaim any harm to their careers by reason of expulsion of Duarte by Rotary. The Court does not accept as true the speculation that at some time in the future their careers *might* suffer from Rotary's male-only policy. The Court is not

persuaded by the evidence introduced in this case that the "male-only" membership restriction of Rotary has deprived any woman of any material or substantial economic advantage. cf. *Goodwin Challenging The Private Club: Sex Discrimination Plaintiffs Barred At The Door*, 13 Southwestern Law Review 237 (1982). In this respect membership in Rotary is *not* equivalent to membership in certain professional societies. cf. *Pinsker v. Pacific Coast Society of Orthodontists*, 1 Cal.3d 160, 165 (1969). Plaintiffs have expressly disclaimed monetary damages.

To force Rotary International by judicial intervention to permit local clubs in California to admit women members contrary to its democratically reaffirmed male-only membership policy would be inequitable. Without limiting the generality of the foregoing, such an injunction would create a substantial risk of irreparable harm to the national and international associational integrity of Rotary without conferring a commensurate or even a material economic, social or other benefit upon the plaintiff women in particular, or women in general.

In addition to the foregoing general findings, the court makes the following fact determinations of particular relevance to the issues raised by the pleadings. Preliminarily, it should be noted that plaintiffs disclaim reliance upon federal law and have used that disclaimer to defeat removal of this case to the federal courts. Rather, they limit their contentions to only three (3) principles of California law.

The Unruh Act (Civil Code § 51)

With respect to this contention, the Court finds that neither Rotary International, nor Rotary District 530 nor plaintiff Duarte are any of the following:

- (a) a business establishment of any kind whatsoever;

(b) an organization conducting a calling, occupation, or trade which its members engage in for the purpose of making a livelihood or gain. cf. *Burks v. Poppy Construction Co.*, 37 C.2d 463, 468 (1982);

(c) an organization engaged in providing goods, services, and facilities to its members as clients, patrons, or customers, cf. *Alcorn v. Ambro Engineering, Inc.*, 2 Cal.3d 493, 500 (1970). In this respect Rotary is materially different from the organizations described in *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn., 1981) and *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex., 1970);

(d) an organization formed or maintained for the protection or advancement of the business or professional interests of its members;

(e) an organization which encourages its members to do business with each other;

(f) an organization primarily engaged in for the purpose of obtaining business contacts for its members.

Moreover, to require Rotary International pursuant to the *Unruh Act* to offer its membership to women (as well as to the entire public indiscriminately) would inflict severe, irreparable, and unconscionable harm upon Rotary and the associational rights of its members without commensurate or any substantial resulting economic benefit to women or the public. To require Rotary International to permit its local clubs in California to offer individual membership to the general public would forcibly inject that general public into Rotarian activities outside California and outside the United States, contrary to existing Rotarian rules and regulations.

Article I, Section 8 of the California Constitution

The Court finds that plaintiff Duarte and Rotary International are not government entities nor is there a nexus

between the "male-only" membership policy of Rotary and any government entity, or action. Plaintiffs have disclaimed "government action".

No act of defendants has directly or indirectly disqualified or otherwise impeded any plaintiff or any woman from entering, or pursuing a business, profession, vocation, or employment because of sex.

The Estoppel Count

The Court accepts as true the testimony of former District 530 governor Paul Bryan that during his visit in July 1977 he expressly advised Duarte that the Constitution of Rotary did not permit admission of women members, that he could not condone Ms. Bogart's membership, but that he would refrain from reporting to Rotary International the violation of Rotary's membership rules by Duarte on the understanding with Duarte that Donna Bogart's membership would be voluntarily terminated. Mr. Bryan neither advocated nor condoned the concealment of Ms. Bogart's identity from Rotary International by the use of the name "Don" or "D. Bogart" or otherwise.

At all relevant times plaintiffs knew that Mr. Bryan did not have actual or ostensible authority to permit Duarte to admit women members.

Duarte admitted women to membership in knowing violation of Rotary's membership restriction, in deliberate violation of the understanding reached with Mr. Bryan in July 1977, and is therefore guilty of unclean hands precluding injunctive relief.

No plaintiff was misled by any act of Mr. Bryan or Rotary District 530 or Rotary International. No plaintiff suffered a detriment by reason of any act of Mr. Bryan or Rotary District 530 or Rotary International.

Rotary was not estopped from enforcing the male only membership restriction in its constitution. It suspended Duarte only after a fair hearing, after full compliance with its internal rules of procedure, and after giving Duarte a fair opportunity to bring its membership in compliance with the male only restriction.

The Court reaches the following conclusions of law, together with any factual determinations implicit therein.

Neither plaintiff Duarte, Rotary International or Rotary District 530 are "business establishments" within the meaning of the California Unruh Civil Rights Act (Civil Code § 51). [*Burks, supra*, 37 C.2d 463, 468 (1962)]. Membership in any of these organizations is not tantamount to being the "client, patron, or customer" of a business establishment [*Alcorn, supra*, 2 Cal.3d 493, 500 (1970)].

The Court accepts the interpretation of legislative history reached by Professor Horowitz that would preclude application of the Unruh Act to "membership" in private organizations, particularly where, as here, that membership connotes substantial personal and social interactions with other members. See *Horowitz, The 1959 California Equal Rights In "Business Establishments" Statute—A Problem In Statutory Application*, 33 So.Cal.L.Rev. 261, 289-290 (1960).

The Court agrees with defendants' contention that the legislative history of the Unruh Act¹ implies a legislative intention to exclude

"membership in any and all business and professional organizations formed or maintained primarily for the protection or advancement of the business or professional interests of the members"

¹ See *Horowitz, supra*, 33 So.Cal.L.Rev. 261, 265-270.

from the scope of

“... accomodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever”,

as the statute was finally enacted.

Moreover, as found above, the Court rejects plaintiffs' contention that the evidence of income tax deductions, payment of dues by employers, etc. connotes that Rotary is an organization having the business and professional interests of its members as a principal or material objective. Rather, the Court finds substantial similarity between Rotary and Kiwanis as described in *Kiwanis Club of Great Neck v. Board of Trustees of Kiwanis International*, 374 NYS 2d 265 (1975, aff'd 383 NYS 2d 383 (1976), aff'd 41 NY 2d 1034. This Court agrees with the conclusion of the New York court that

“The fact that individual members may use their membership in a club to further their own business interests does not, in any way, change the avowed purpose of the organization, or convert it into a commercial club.” 374 NYS 2d at 268.

Moreover, even if Rotary were a commercial club explicitly rendering economic services to its members, that fact alone [would] not imply a duty under the Unruh Act or otherwise, to share those economic services indiscriminately with any member of the public who desires membership. Plaintiffs have conceded that the present case is closely similar to the New York Kiwanis case but contend that under California law, the opposite result should obtain. The Court disagrees.

The “male only” membership policy of Rotary is not itself tantamount to the action of any government, nor is there a material “nexus” between any government action and the

"male-only" membership restriction of Rotary, which is a private association of private local clubs. Article I, § 8 of the California Constitution has only been applied as a restriction on government action and thus is not applicable to Duarte, Rotary International, or Rotary District 530. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 8-10 (1971).

Where, as here, there is no persuasive proof that exclusion from membership in the purely private organizations comprising Rotary has imposed a material or substantial economic constraint upon any woman, it would be a violation of defendants' rights to liberty of association under the United States Constitution for the California Courts or Legislature to require the defendant organizations to accept women in contradiction of the male only membership restrictions which have been frequently and recently reaffirmed democratically by the members of Rotary, *Healy v. James*, 408 N.S. 169 (1972); *Moose Lodge v. Irvis*, 407 U.S. 163, 179-180 (Mr. Justice Douglas, dissenting) *Griswold v. Connecticut*, 381 U.S. 479, 483 n. 20 (1965); *Bell v. Maryland*, 378 U.S. 226, 313 (1964); *Gibson v. Florida etc.*, 372 U.S. 539, 543 (1963); *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958). See also 5 Witkin, *Summary of California Law*, Constitutional Law §§ 165, 224.

Were the Unruh Act applicable to the membership policy of Rotary, it would not merely eliminate selectivity as to women; it would eliminate virtually any discretion in the selection of members. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 730-736 (1982); *In re Cox*, 3 Cal. 3d 205, 216 (1970). The severe harm to Rotary caused by this latter consequence is not balanced by any material economic benefit either to the public in general or to women in particular, would be inequitable and would therefore preclude the injunctive relief sought herein.

Plaintiffs have asked this California court to apply California law to an Illinois corporation administering a worldwide voluntary association of 20,000 local clubs comprise 1,000,000 men operating in substantial measure not merely outside California but also in a diversity of 156 foreign cultures outside the United States. They ask this Court to force that association against its repeatedly expressed democratic preferences to accept not merely into its society, but to accept *as members* into its policy making councils a class of persons who, at least at the present time, are not freely welcome to a majority of that association's membership. There has been neither a showing [n]or a claim that Illinois law has been violated, [n]or have plaintiffs demonstrated any economic or other reasons why, under well-settled constitutional principles of interstate comity, the law of Illinois should not be the sole test of that corporation's internal membership rules. See generally 5 Witkin, *Summary of California Law*, Constitutional Law, § 289; *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 624 (1947). The Court concludes that these extra-territorial considerations alone are sufficient to decline granting the drastic injunctive relief sought by plaintiffs.

For the above reasons, judgment shall be entered in favor of the defendants and against the plaintiffs.

DATED: March 21, 1983.

MAX F. DEUTZ

Max F. Deutz,
Judge of the Los Angeles
County Superior Court

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No. 83-724

In The
Supreme Court of the United States
OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, HUBERT H. HUMPHREY III,
AND GEORGE A. BECK,

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v.

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BRIEF OF THE WOMEN'S ISSUES NETWORK, INC.,
BUSINESS AND PROFESSIONAL WOMEN'S CLUB OF
DALLAS, INC., NATIONAL COUNCIL OF JEWISH
WOMEN — GREATER DALLAS SECTION, SOUTHERN
METHODIST UNIVERSITY ASSOCIATION OF WOMEN
LAW STUDENTS, STATE BAR OF TEXAS WOMEN AND
THE LAW SECTION, WOMEN'S CENTER OF DALLAS,
AS AMICI CURIAE IN SUPPORT OF REVERSAL

NEIL H. COGAN
Attorney for *Amici Curiae*

Southern Methodist University
School of Law
3315 Daniel Avenue
Dallas Texas 75275
(214) 692-2579

February 22, 1984

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE RIGHT OF ASSOCIATION IS NOT UNITARY; ASSOCIATION WITH MEN ONLY IN ORDER TO ADVOCATE THE "BROTHER- HOOD OF MAN" IMPLICATES SPEECH, WHILE ASSOCIATION WITH MEN ONLY IN ORDER TO ASSOCIATE WITH MEN ONLY IMPLICATES PRIVACY	4
II. THERE WAS NO RECORD SHOWING THAT THE ADMISSION OF WOMEN WILL AFFECT THE ASSOCIATION'S POSITION ON ANY PUBLIC ISSUE	6
III. IF SEXUAL INEQUALITY IS A POSITION OF THE ASSOCIATION, A PRACTICE OF SEXUAL DISCRIMINATION IN FURTHERANCE OF THAT POSITION IS NOT PROTECTED SPEECH	8
IV. A PRACTICE OF SEXUAL DISCRIMINATION BY AN ASSOCIATION THAT PURSUES ACTIVE PARTICIPATION AND INFLUENCE IN THE COMMUNITY IS NOT PROTECTED PRIVACY	11
CONCLUSION	14

TABLE OF CITATIONS

Cases	Page
<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209 (1977)	6
<i>Adamson v. California</i> , 332 U.S. 46 (1947)	4
<i>Associated Press v. United States</i> , 326 U.S. 1 (1945)	12
<i>Bell v. Maryland</i> , 378 U.S. 226 (1964)	11
<i>Belle Terre v. Boraas</i> , 416 U.S. 1 (1974)	11
<i>Bob Jones University v. United States</i> , 103 S.Ct. 2017 (1983)	3, 10
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	9
<i>Bunzel v. American Academy of Orthopaedic Surgeons</i> , 107 Cal. App. 3d 165, 165 Cal. R. 433 (C.A. 1980)	12
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942)	9
<i>Consolidated Edison Co. v. Public Service Comm'n</i> , 447 U.S. 530 (1980)	9
<i>Craig v. Boren</i> , 429 U.S. 190 (1975)	8
<i>DeJonge v. Oregon</i> , 299 U.S. 353 (1937)	5
<i>Democratic Party of the United States v. Wisconsin</i> <i>ex rel. LaFollette</i> , 450 U.S. 107 (1981)	7
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968)	4
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978)	9
<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773 (1975)	12
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	5, 11
<i>Hatley v. American Quarter Horse Ass'n</i> , 552 F.2d 646 (5th Cir. 1977)	12
<i>Heart of Atlanta Motel, Inc. v. United States</i> , 379 U.S. 241 (1964)	11

TABLE OF CITATIONS — (Continued)

Cases	Page
<i>Hishon v. King & Spalding</i> , No. 82-940 (U.S.)	2, 6, 12
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	4
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	5
<i>Michael M. v. Superior Court</i> , 450 U.S. 464 (1981)	8
<i>Minnesota State Board for Community Colleges v. Knight</i> , Nos. 82-898, 82-977 (U.S.)	6
<i>Montague & Co. v. Lowry</i> , 193 U.S. 38 (1904)	12
<i>Moore v. East Cleveland</i> , 431 U.S. 494 (1977)	5
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958)	4, 5, 7
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	9
<i>New York v. Ferber</i> , 458 U.S. 747 (1982)	9
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	9, 10
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973)	9
<i>Paris Adult Theater I v. Slaton</i> , 413 U.S. 49 (1973)	9
<i>Railway Employees' Dep't v. Hanson</i> , 351 U.S. 225 (1956)	6, 12
<i>Railway Mail Ass'n v. Corsi</i> , 326 U.S. 88 (1945)	12
<i>Ramsey Co. v. Associated Billposters</i> , 280 U.S. 501 (1923)	12
<i>Regents of University of California v. Bakke</i> , 438 U.S. 285 (1978)	12
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	5
<i>Ryan v. McCrary</i> , 427 U.S. 160 (1975) ..	3, 5, 9, 11, 12, 13

TABLE OF CITATIONS— (Continued)

Cases	<u>Page</u>
<i>Smith v. Organization of Foster Families</i> , 431 U.S. 816 (1977)	11
<i>Terry v. Adams</i> , 345 U.S. 461 (1953)	11
 Constitution and Statutes	
U.S. Const. amend. I	5, 7, 9, 10
U.S. Const. amend. IV	4
U.S. Const. amend. XIV	4, 7, 11
Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681	13
42 U.S.C. § 1981	12
Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a	13
Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d	12
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e	2, 13
 Articles	
Chafee, <i>The Internal Affairs of Associations Not for Profit</i> , 43 Harv. L. Rev. 993 (1930)	12
Fellowship and Philanthropy, <i>The Men and Mission of the Salesmanship Club</i> , "D" Magazine 69 (Jan 1983)	10
<i>Lunch Bunch Liberated</i> , Houston City Magazine 8 (Sept. 1982)	10
<i>Sexual discrimination in progressive Austin? Yep!</i> Dallas Morning News, D-3 (Mar. 11, 1981)	10
Summers, <i>The Law of Union Discipline: What the Courts Do In Fact</i> , 70 Yale L.J. 175 (1960)	12
<i>Women legislators boycotting hotel</i> , Dallas Times Herald, A-1 (Feb. 12, 1981)	10

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LAW STUDENTS, STATE BAR OF TEXAS WOMEN AND
THE LAW SECTION, WOMEN'S CENTER OF DALLAS,
AS AMICI CURIAE**

Amici respectfully submit this brief in support of
appellants.

INTEREST OF AMICI

The Women's Issues Network is an association that encourages and supports individuals and organizations in the Dallas area in particular and in Texas in general to advocate equal opportunity and advancement for women. The members of the Network represent several dozen organizations, each of which seeks to promote human dignity. The Network

coordinated the filing of this brief, as well as a brief in *Hishon v. King & Spalding*, No. 82-940.

The Business and Professional Women's Club of Dallas, Inc. is a not-for-profit corporation that promotes the interests and economic self-sufficiency of business and professional women by seeking elimination of restrictive and discriminatory work laws and the adoption of equitable terms and conditions of employment. The club presents programs and seminars, acts to influence legislation, and provides a network for women.

The National Council of Jewish Women, Greater Dallas Section, is an association that, in the spirit of Judaism, is dedicated to furthering freedom and welfare in the Jewish and general communities. The members of the Council provide essential social services and present educational programs to the community. The promotion of equal opportunity for employment and advancement is one of the Council's priorities.

The State Bar of Texas Women and the Law Section and the Southern Methodist University Association of Women Law Students are each associations of lawyers or law students that seek to encourage women to study and practice law, expand employment opportunities for women lawyers, remove barriers to effective participation by women lawyers in the bar, and inform the bar and public of issues affecting women and women lawyers. Each association regularly presents public programs and seminars, acts to influence legislation, and provides women lawyers and law students a network. The law students' association in 1975 through 1980 sued four Dallas law firms, in which suits it asserted that the firms' employment practices violated Title VII of the Civil Rights Act of 1964.

The Women's Center of Dallas is a not-for-profit corporation that seeks to change society's expectations of women through research, education, counseling and communication. Past activities of the Center include employment counseling, teaching entry skills, providing a job bank and promoting job sharing.

SUMMARY OF ARGUMENT

The Jaycees present two different kinds of associational claims, an associational speech claim and an associational privacy claim.

The speech claim — that the admission of women will affect the positions the Jaycees take on public issues — is insubstantial because there was no record showing that women Jaycees will differ from men Jaycees on the issues. The assumption that there is a difference is a stereotypical view of women who, like the men Jaycees, are in middle- and upper-management. If the Jaycees' positions include the inequality of men and women, which we believe has not been asserted, a *practice* of sexual discrimination in furtherance of that position may be prohibited by reasonable legislation in furtherance of legitimate state interests. See *Runyon v. McCrary*, 427 U.S. 160 (1976). Indeed, prohibiting the practice of sexual discrimination is not only a legitimate state interest, it is a compelling state interest. See *Bob Jones University v. United States*, 103 S.Ct. 2017 (1983).

The privacy claim — that the admission of women will prevent men from choosing to have a relationship with men only — does not deserve special protection. The Jaycees are not an intimate association. To the contrary, they actively pursue participation and influence in the community and its

affairs. State and federal law have traditionally regulated such public associations in the public interest.

ARGUMENT

I. THE RIGHT OF ASSOCIATION IS NOT UNITARY; ASSOCIATION WITH MEN ONLY IN ORDER TO ADVOCATE THE "BROTHERHOOD OF MAN" IMPLICATES SPEECH, WHILE ASSOCIATION WITH MEN ONLY IN ORDER TO ASSOCIATE WITH MEN ONLY IMPLICATES PRIVACY.

Too often in constitutional litigation and adjudication it is forgotten that "association" appears neither in the text of the Fourteenth Amendment nor in the text of the Bill of Rights. Rather, the right of association is "an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Of course, all other rights protected by the Due Process Clause have the same open-textured, textual source. But most of them do appear explicitly in the text of the Bill of Rights. Regardless of whether such Fourteenth Amendment rights are greater or lesser than, or equal to, their cognate, explicit rights, see *Adamson v. California*, 332 U.S. 46, (1947); *Duncan v. Louisiana*, 391 U.S. 145 (1968), these Fourteenth Amendment rights have at least some obvious starting-places for their sources and principles.¹ This is not the case for "association."

Amici respectfully submit that "association," as an aspect of "liberty," is not unitary in source or principle. Rather, we

¹This is not to say that text is the sole source for constitutional adjudication, even where text is not open-textured. See *Katz v. United States*, 389 U.S. 347 (1967) (Fourth Amendment "privacy"). Rather, text is the starting-place. See n.2 *infra*.

submit, "association" has an advocacy of ideas or speech aspect, and it also has a privacy of relationship aspect. The advocacy of ideas or speech aspect has of course a plain, but not sole, source in the text of the First Amendment. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); cf. *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) ("assembly"). The privacy of relationship aspect has an implicit or penumbral source in the text of several Amendments, as well as elsewhere. See *Griswold v. Connecticut*, 381 U.S. 479, 481-85 (1965); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (Powell, J.).¹

Distinguishing the several aspects of "association" clarifies the results in this Court's adjudication of association claims. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court considered several claims made by whites that they had a right not to admit black children to a private school. The Court considered the claims as associational, parental, and privacy, although it plainly was uncomfortable in doing so. See *id.* at 178 and n.15. Put as we have submitted above, however, the claims were two different kinds of associational claims—a speech claim that whites had a right to operate a school where they taught their children the doctrine of white racial

¹Moreover, each of the relationships in these decisions is somewhat different from the others; each has somewhat different sources and principles. We emphasize these differences not because we are either surprised or troubled by them; we emphasize them to make sure that different associational claims are considered differently.

We support each of the associational relationships described in the referenced decisions. We agree with the Court's use of non-textual sources to protect personal liberty. Chief Justice Marshall's statement "that it is a constitution we are expounding," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (original emphasis), was meant to capture the Court's understanding that the Constitution is not a legal code but rather an instrument setting out "only its great outlines." *Id.*

supremacy, and a privacy claim that whites had a right to operate a school where they precluded their children from having relationships with black children.

In *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), the Court considered claims by employees that they had a right not to join a union shop. Put as we have submitted, the claims were two associational claims — a privacy claim that employees had a right not to have a relationship with a union, and a speech claim that employees had a right not to support union "ideology" with which they disagreed. See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Amici submit that, similarly, there are two associational claims made by the association here. One claim is to associate with men only because men support the association's public positions, a claim that implicates speech. The other is a claim to associate with men only in order to have a relationship with men only, a claim that implicates privacy. By failing to distinguish the claims, the court of appeals failed both to frame the issues clearly and to rely upon the appropriate case law.²

II. THERE WAS NO RECORD SHOWING THAT THE ADMISSION OF WOMEN WILL AFFECT THE ASSOCIATION'S POSITION ON ANY PUBLIC ISSUE.

Because an association takes stands on public issues, it does not follow that each of the association's practices is

²This Court has at least two other cases in which associational claims are being made. *Hishon v. King & Spalding*, No. 82-940; and *Minnesota State Board for Community Colleges v. Knight*, Nos. 82-698, 82-977. We submit that analysis in those cases would be aided by distinguishing the associational speech claims from the associational privacy claims. As amici in *Hishon* also, we respectfully submit that there is no substantial associational speech claim in that case.

especially protected by the First Amendment.⁴ Were this not so, then every club in a "dry area" of Texas need only take a position in the Presidential campaign in order to raise a substantial defense to suit under a public accommodations statute. Rather, an association's practice is examined as conduct is traditionally examined under the First Amendment, that is, to determine whether government regulation of the conduct significantly burdens First Amendment speech and, if it does, whether the government regulation satisfies the scrutiny accorded to such speech-related conduct. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461-63 (1958); *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 130-31 (1981) (Powell, J., dissenting).⁵

Amici submit that there is no showing in the record that Minnesota's regulation of admission to the Jaycees would in any manner, let alone in any significant manner, burden First Amendment speech. See *id.* at 122. While politicians and the media may speculate, as did the court of appeals, that the admission of women into an association may affect the positions the association takes on issues, 709 F.2d at 1576 ("[t]he regulation ... has the potential of changing [the] content of what the Jaycees are saying..."), plainly there is nothing in the record showing that the women who would join the Jaycees would take positions different from men on such recent Jaycee issues as the President's economic policies or this Court's appellate jurisdiction, or

⁴Since so much of this Court's decisional law assumes that the First Amendment embraces the entire speech aspect of Fourteenth Amendment "liberty," we shall use "First Amendment" when referring to Fourteenth Amendment speech.

⁵The majority in *Democratic Party* endorsed the traditional analysis because of the nature of the national political parties.

would disagree with men on such elements of the Jaycees creed as "faith in God," "free enterprise" and the transcendency of "the brotherhood of man" over "the sovereignty of nations." *Id.* at 1570. While there are some differences between men and women that do not require a record showing, see *Michael M. v. Superior Court*, 450 U.S. 484, 471 (1981) (Rehnquist, J.); *id.* at 479 (Stewart, J., concurring); *id.* at 481-82 (Blackmun, J., concurring in judgment), plainly it is not apparent that with regard to the above positions there are differences between the men and women who would join the Jaycees. Cf. *Craig v. Boren*, 429 U.S. 190, 200-01 (1975) (rejecting statistical proof).

What the court of appeals did was to stereotype men and women with regard to their positions on issues. It assumed that the typical upper- and middle-management man who joins the Jaycees, 709 F.2d at 1572, will be different from a similarly-situated woman. Such stereotypical assumptions about men and women, particularly men and women in the business world, are anathema to clear thinking and help maintain barriers to women's entry into business and the professions. They do not belong in constitutional adjudication.

III. IF SEXUAL INEQUALITY IS A POSITION OF THE ASSOCIATION, A PRACTICE OF SEXUAL DISCRIMINATION IN FURTHERANCE OF THAT POSITION IS NOT PROTECTED SPEECH.

If it is asserted — and we do not believe it has been — that the Jaycees' positions include the dominance of men over women, cf. 709 F.2d at 1570 ("the brotherhood of man," not people), or a preference for men over women in leadership positions, then government regulation of admission to membership does significantly burden associational speech. Moreover, such advocacy of male supremacy could not be

prohibited, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969), although this Court has given decidedly less protection to content not at the core of First Amendment values. See *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980) (commercial speech); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (Stevens, J.) (offensive words); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) (obscenity); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

Nonetheless, the practice of male supremacy, as opposed to the advocacy of male supremacy, is not entitled to special First Amendment protection. While this Court was divided on the statutory issue, no member of the Court dissented from the constitutional holding in *Runyon v. McCrary*, 427 U.S. 160 (1976); see *id.* at 192 n.2 (White, J., dissenting). For the Court, Justice Stewart stated that there is a difference between advocacy and practice of racial segregation, and he reaffirmed the holding in *Norwood v. Harrison*, 413 U.S. 455, 470 (1973), that while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment...it has never been accorded affirmative constitutional protection." 427 U.S. at 176.

The correctness of the holding is plain. The case law has always assumed that government could regulate or prohibit much conduct—e.g., sabotage, assault, trespass—the advocacy of which it could not punish. Government can punish such conduct even though the conduct enhances and vindicates speech. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912-20 (1982).

Where advocacy is of sexual inequality and sexual discrimination is in furtherance thereof, government prohibition of such conduct is subject to deferential judicial scrutiny; Minnesota has plainly satisfied such scrutiny in this case. Even were scrutiny somewhat higher, Minnesota would nonetheless satisfy such scrutiny. See *Bob Jones University v. United States*, 103 S.Ct. 2017, 2029-31 (1983).

The entry of women into business and the professions is a compelling interest of government. Many associations and clubs here in Texas, as well as elsewhere in the nation, provide access to many of the best business and professional opportunities. See *Fellowship and Philanthropy*, *The Men and Mission of the Salesmanship Club*, "D" Magazine 69 (Jan. 1983); *Lunch Bunch Liberated*, Houston City Magazine 8 (Sept. 1982); *Sexual discrimination in progressive Austin? Yep!*, Dallas Morning News, D-3 (Mar. 11, 1981); *Women legislators boycotting hotel*, Dallas Times Herald, A-1 (Feb. 12, 1981) (club barring woman legislator). In a society where rewards are determined by merit and not birth, it is a compelling interest of government to assure that business and professional opportunities are not denied because a person was born a woman and not a man.

Government prohibition of sexual discrimination in membership practices accords with First Amendment values and democratic decision-making. While the positions of the Jaycees may not change as a result of the admission of women, nonetheless the admission of woman plainly will make their debate more "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Moreover, given the important influence that associations such as the Jaycees have on decision-making in local communities throughout the nation, the admission of women will give them access to the debate that so often affects them. The

Jaycees may not be the Jaybirds, see *Terry v. Adams*, 345 U.S. 461 (1953), but it does not follow that government is powerless to open the Jaycees' doors to the participation of women.

IV. A PRACTICE OF SEXUAL DISCRIMINATION BY AN ASSOCIATION THAT PURSUES ACTIVE PARTICIPATION AND INFLUENCE IN THE COMMUNITY IS NOT PROTECTED PRIVACY.

Because an association is selective in membership, it does not follow that its practices, including its membership procedures and standards, are specially protected by the privacy aspect of the Due Process Clause of the Fourteenth Amendment. Were this not so, then antitrust regulation of the Washington Redskins and every other competent sports club would be subject to heightened judicial scrutiny. Rather, unless the association is family or otherwise an intimate group, government regulation of associational practices is subjected to traditional deferential scrutiny. See *Runyon v. McCrary*, 427 U.S. 160, 177-78 (1976); *Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); cf. *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964); *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).

A "careful respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrine of federalism and separation of powers have played," *Griswold v. Connecticut* 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment), counsel against any enlargement of Fourteenth Amendment protection for community associations that do not keep their activities secret but indeed

pursue active participation and influence in the community and its affairs.* The common law has long regulated the membership practices of associations. See Chafee, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993 (1930) (discipline & expulsion); Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 Yale L. J. 175, 179-87 (1960) (discipline & expulsion). This has included particularly close regulation of membership admission practices of associations with significant power in the applicable community. See *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 655-56 (5th Cir. 1977); *Bunzel v. American Academy of Orthopaedic Surgeons*, 107 Cal. App. 3d 165, 165 Cal. R. 433 (C.A. 1980). The membership admission practices of associations have long been regulated by federal labor law, see *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and federal antitrust law, *Montague & Co. v. Lowry*, 193 U.S. 38 (1904); *Ramsey Co. v. Associated Billposters*, 260 U.S. 501 (1923); *Associated Press v. United States*, 326 U.S. 1 (1945), cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781-92 (1975). See also *Bakke v. Regents of the University of California*, 438 U.S. 265 (1978) (Title VI); *Runyon v. McCrary*, 427 U.S. 160 (1976) (42 U.S.C. § 1981).

Our basic values counsel against special protection for closed associations that have significant participation and influence in the community. Many of the associations that discriminate against women, here in Texas as well as elsewhere in the nation, are the places where important decisions are made affecting our communities and where important relationships are made affecting entry into business

*This applies as well to the law firm in *Hishon v. King & Spalding*, No. 82-940. Law firms in America by their very nature pursue active participation and influence in the community and its affairs.

and government. See authorities cited p. 10, *supra*. The exclusion of women from these associations excludes them from power and stigmatizes them as second-class business people and community leaders. We have long rebelled at concentrations of power that deny entry to the "outs" and reinforce the power of the "ins." These are not the kind of associations that warrant special protection.

Moreover, in our federal system, where state and local governments seek both to reinforce and supplement federal law, they should not be discouraged by special impediments. Minnesota's statute plainly reinforces and supplements Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a. Further, Minnesota's statute importantly reinforces Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. See *Runyon v. McCrary*, 427 U.S. 160, 179 n.16 (1976) ("[t]he Court has recognized the link between equality of opportunity to obtain an education and equality of employment opportunity"). Without a statute like Minnesota's, even a prestigious M.B.A. or J.D. will not be a woman's ticket of admission to the places where her potential clients relax with, and grow confident in, their potential advisers, managers and lawyers.

CONCLUSION

For the above reasons, amici submit that a state law prohibiting sexual discrimination by an association such as the Jaycees does not violate associational rights of speech or privacy. We respectfully submit that the court of appeals' decision to the contrary should be reversed.

Respectfully submitted,

NEIL H. COGAN
Attorney for Amici Curiae
Southern Methodist University
School of Law
3315 Daniel Avenue
Dallas, Texas 75275
(214) 692-2579

No. 83-724-AFX
Status: GRANTED

Title: Kathryn R. Roberts, Commissioner, Minnesota
Department of Human Rights, et al., Appellants
v.
United States Jaycees

Docketed:
October 31, 1983

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for appellant: Varco, Jr., Richard L.

Counsel for appellee: Hall Jr., Carl D.

Entry	Date	Note	Proceedings and Orders
1	Oct 31 1983	G	Statement as to jurisdiction filed.
2	Oct 31 1983		Appendix of appellant Gomez-Bethke, Commr., et al. filed.
3	Nov 30 1983		Brief amicus curiae of California, et al. filed.
4	Dec 1 1983		Motion of appellee U. S. Jaycees to affirm filed.
5	Dec 1 1983	G	Motion of Northwestern Bell Telephone Company for leave to file a brief as amicus curiae filed.
6	Dec 1 1983	G	Motion of National Organization for Women, et al. for leave to file a brief as amici curiae filed.
7	Dec 7 1983		DISTRIBUTED. January 6, 1984
8	Jan 9 1984		Motion of Northwestern Bell Telephone Company for leave to file a brief as amicus curiae GRANTED.
9	Jan 9 1984		Motion of National Organization for Women, et al. for leave to file a brief as amici curiae GRANTED.
10	Jan 9 1984		PROBABLE JURISDICTION NOTED. *****
11	Feb 23 1984		Brief amicus curiae of Natl. League of Cities, et al. filed.
12	Feb 23 1984	G	Motion of Community Business Leaders for leave to file a brief as amicus curiae filed.
13	Feb 22 1984		Brief amicus curiae of Women's Issues Netwk., et al. filed.
14	Feb 24 1984		Brief amicus curiae of New York filed.
15	Feb 27 1984		Brief of appellants filed.
16	Feb 27 1984		Joint appendix filed.
17	Feb 25 1984		Brief amicus curiae of Alliance for Women Membership filed.
18	Feb 27 1984		Brief amicus curiae of ACLU, et al. filed.
19	Feb 27 1984		Brief amicus curiae of NAACP Legal Defense Fund filed.
20	Feb 27 1984		Brief amicus curiae of NOW, et al. filed.
21	Mar 5 1984		Motion of Community Business Leaders for leave to file a brief as amicus curiae GRANTED. Justice Marshall OUT.
22	Mar 7 1984		Record filed.
23	Mar 7 1984		Certified original record & C.A. proceedings, 3 volumes received.
24	Mar 10 1984		Record filed.
25	Mar 10 1984		Certified exhibits received - box.
26	Mar 20 1984		SET FOR ARGUMENT. Wednesday, April 18, 1984. (4th case)
27	Mar 23 1984		Brief amicus curiae of Boy Scouts of America filed.
28	Mar 23 1984		Brief amicus curiae of Conf. of Private Organizations filed.
29	Mar 26 1984		Brief of appellee U. S. Jaycees filed.
30	Mar 27 1984		CIRCULATED.
31	Mar 26 1984		Brief amicus curiae of Rotary International filed.
32	Apr 11 1984	X	Reply brief of appellants filed.
33	Apr 18 1984		ARGUED.